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U. S. COURT HOUSE, NEW YORK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-16

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANTS,

v.

ERNEST MANDAL, DAVID MERMELSTEIN, WASSILY LEONTIEV, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENACHE, NOAM CHOMSKY, AND RICHARD A. FALK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTION STATEMENT FILED JULY 2, 1971
PROBABLE JURISDICTION NOTED JANUARY 19, 1972

INDEX TO APPENDIX

	Page
Docket Entries.....	1
Complaint.....	3
Summons.....	23
Amended Complaint.....	23
Notice of Motion by Plaintiffs and Affidavit.....	24
Exhibit A.....	33
Exhibit B.....	34
Exhibit C.....	35
Exhibit D.....	36
Exhibit E.....	37
Exhibit F.....	39
Exhibit G.....	40
Exhibit H.....	42
Exhibit I.....	42
Exhibit J.....	43
Exhibit K.....	44
Exhibit L.....	46
Exhibit M.....	48
Exhibit N.....	49
Exhibit O.....	50
Exhibit P.....	66
Exhibit Q.....	68
Exhibit R.....	71
Order designating three judge court.....	84
Answer.....	84
Affidavit of Lloyd H. Baker, Assistant United States Attorney.....	86
Decision.....	89
Order for preliminary injunction and declaratory judgment.....	89
Notice of Appeal.....	90
Motion for Stay and Affidavit.....	90
Orders for Stay.....	92
The Order of this Court Noting Probable Jurisdiction (January 10, 1972)*.....	94

*Decision of the district court appears as Appendix to the jurisdictional statement, pp. 1a-50a.

Date	Docket entries
March 19, 1970	Complaint filed. Summons issued.
March 27, 1970	Summons returned and filed. Defendants served on March 19, 1970.
May 12, 1970	Amended complaint filed.
May 22, 1970	Notice of motion and plaintiffs' memorandum of law filed, convening a three-judge court and pursuant to Rule 65 for a preliminary injunction etc. (returned June 12, 1970).
May 26, 1970	By BARTELS, J. Order filed extending time of Defendant to answer to June 26, 1970 (P/C mailed to attorney.)
June 12, 1970	Before BARTELS, J. Case called. Motion argued. Decision reserved. Court will convene three-judge court to hear this motion at a future date.
June 17, 1970	By LUMBARD Ch J. U.S. Court of Appeals: Order filed designating in addition to Judge Bartels, Hon. Wilfred Feinberg, and John F. Dooling, Jr., to hear and determine said cause etc. (P/Cs mailed to attorneys.) Copies of order mailed to Hon. Wilfred Feinberg and John F. Dooling, Jr.
June 24, 1970	Before FEINBERG, Cir. J., BARTELS, J. and DOOLING, J.—Case called, motion argued—Decision reserved.
July 8, 1970	Answer of defendants filed. (Affidavit of service by mail on July 8, 1970.)
July 17, 1970	Affidavit of Lloyd H. Baker filed.
March 18, 1971	By FEINBERG, Cir. J., BARTELS, J. and DOOLING, J.—Memorandum filed. Decision rendered granting plaintiffs a preliminary injunction, etc. Settle order on notice.
April 13, 1971	By FEINBERG, Cir. J., DOOLING, J.—Order filed that plaintiffs' motion for preliminary injunction and declaratory judgment is granted. That defendants are enjoined and restrained from enforcing etc. of the Immigration & Nationality Act so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor etc. and that the effectiveness of the second decretal paragraph is stayed for 20 days from the date hereof. (P/C mailed to attorneys.)

Date	Docket entries
May 3, 1971-----	Notice of appeal filed. (Copy to U.S. Court of Appeals and plaintiff's attorney.)
May 4, 1971-----	Notice of motion and Memorandum of Law convening a 3-judge court for an order staying the order dated April 13, 1971 returned May 7, 1971. Filed.
May 11, 1971-----	By FEINBERG, J. BARTELS, J. DOOLING, J.—Order filed that a stay of the order (April 13, 1971), is granted for 30 days from the date hereof. If during the 30-day period defendants file their jurisdictional statement on appeal from said order with the Supreme Court the stay shall continue until final disposition by the Supreme Court. (P/C mailed to attorneys.)
May 13, 1971-----	Copy of notice of appeal returned from Court of Appeals and mailed to Supreme Court of the United States.

United States District Court, Southern District of New York
ERNEST MANDEL; DAVID MERMELSTEIN; WASSILY LEONTIEF;
NORMAN BIRNBAUM; ROBERT L. HEILBRONER; ROBERT PAUL
WOLFF; AND LOUIS MENASHE, PLAINTIFFS

against

JOHN M. MITCHELL, ATTORNEY GENERAL OF THE UNITED
STATES; WILLIAM P. ROGERS, SECRETARY OF STATE,
DEFENDANTS

COMPLAINT

Plaintiffs, for their complaint, allege:

1. This action arises under the Constitution of the United States, in particular, the First and Fifth Amendments thereto. The jurisdiction of this Court is based upon 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331, 1361 and upon Art. I, Sec. 9, Cl. 2 of the Constitution and the First and Fifth Amendments thereto.

2. The matter in controversy, exclusive of interest and costs, exceeds the value of Ten Thousand Dollars (\$10,000.00).

3. The venue of this action lies in this District under the provisions of 28 U.S.C. § 1391(e).

4. This action is brought to redress past and prevent future deprivations of plaintiff's rights, privileges and immunities secured by the Constitution of the United States.

a. Plaintiffs seek a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and a Preliminary and Permanent Injunction to invalidate subsections (a)(28) and (d)(3)(A) of 8 U.S.C. § 1182 on their face and as applied, and to restrain the defendants from enforcing or implementing these statutory provisions by regulation, directive, order or otherwise generally and specifically in the case of the application for a visa and admission into the United States by the above-named plaintiff, ERNEST MANDEL.

b. Plaintiffs also seek affirmative and other appropriate relief as hereinafter set forth in this complaint.

c. Because this action draws into question the constitutional validity of an Act of Congress, 8 U.S.C. § 1182 (a)(2) and (d)(3)(A), on its face and as applied and seeks an injunction against its enforcement, operation and execution, a three-judge Court is required to be convened under 28 U.S.C. §§ 2282, 2284.

5. Plaintiffs challenge the constitutionality of the following statutory provisions:

8 U.S.C. § 1182 (a) (28) (hereafter the "Political Ineligibility provision") in pertinent part provides:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States.

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrine of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 786 of Title 50, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (G) of this paragraph;

(I) Any alien who is within any of the classes described in subparagraph (B)-(H) of this paragraph because of membership in or affiliation with a party or organization or a section, subsidiary, branch, affiliate, or subdivision thereof, may, if not otherwise ineligible, be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such application for a visa, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. Any such alien to whom a visa has been issued under the provisions of this subparagraph may, if not otherwise inadmissible, be admitted into the United States if he shall establish to the satisfaction of the Attorney General when applying for admission to the United States and the Attorney General finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and when necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for admission actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary,

branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. The Attorney General shall promptly make a detailed report to the Congress in the case of each alien who is or shall be admitted into the United States under (ii) of this subparagraph;

8 U.S.C. § 1182(d)(3)(A) (hereinafter the "Waiver" provision) in pertinent part provides:

(d) (3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27) and (29)), may, after approval of the Attorney General or a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General * * *

6. Plaintiffs are as follows:

a. ERNEST MANDEL, (hereinafter "MANDEL") a citizen of Belgium, is an internationally noted Marxian scholar and economist and the author of *Marxist Economic Theory* (1969), a major work in his field.

b. Professor DAVID MERMELSTEIN of the Department of Social Science, Polytechnic Institute of Brooklyn, residing in Brooklyn, New York; Professor WASSILY LEONTIEF of the Department of Economics, Harvard University, residing in Cambridge, Massachusetts; Professor NORMAN BIRNBAUM of the Department of Anthropology-Sociology, Amherst College, residing in Amherst, Massachusetts; Professor ROBERT L. HEILBRONER of the Department of Economics, New School for Social Research, residing in New York City, New York; Professor ROBERT PAUL WOLFF of the Department of Philosophy, Columbia University, residing in New York City, New York; Associate Professor LOUIS MENASHE, of the Department of Social Sciences, Polytechnic Institute of Brooklyn, residing in Brooklyn, New York (hereinafter "AMERICAN PLAINTIFFS") are citizens of the United States.

7. The defendants are as follows:

a. WILLIAM ROGERS, as Secretary of State (hereinafter "SECRETARY") is the executive head of the Department of State and in that capacity and through his agents, representatives, and delegates exercises the duty of directing and supervising the issuance of nonimmigrant visas under 8 U.S.C. § 1201(a)(2) and the investigation and declaration of political ineligibility for receiving such visas under 8 U.S.C. § 1182(a)(28). In the case of an alien having been declared politically ineligible, the SECRETARY is authorized by 8 U.S.C. § 1182(d)(3)(A) to submit a recommendation to the Attorney General of the United States that the latter official exercise power granted to him by 8 U.S.C. § 1182(d)(3)(A) to waive the alien's ineligibility.

b. JOHN M. MITCHELL, as Attorney General of the United States (hereinafter "ATTORNEY GENERAL") is the executive head of the Department of Justice and in that capacity and through his agents, representatives and delegates exercises the power granted by 8 U.S.C. § 1182(d)(3)(A) to accept or reject the SECRETARY'S recommendation that an alien's political ineligibility be waived.

8. In March 1962, MANDEL applied for a "working journalist" visa to enter the United States for the purpose of writing articles for a Belgian publication. At that time, on information and belief, the SECRETARY ruled that MANDEL was politically ineligible for a visa. Nevertheless, MANDEL was issued a nonimmigrant visa, apparently as a result of a waiver of ineligibility.

9. Again, in 1968, MANDEL'S application for a nonimmigrant visa was granted, permitting him to accept invitations by thirty major American universities to give lectures and participate in scholarly conventions.

10. In the Summer of 1969, some of the AMERICAN PLAINTIFFS, together with other citizens of the United States invited MANDEL to debate Professor John Kenneth Galbraith of Harvard on the subject of "Technology and the Third World"; the debate was planned and publicized as a featured segment of a conference scheduled to be held on October 17-18 and sponsored by the Graduate Students Association of Stanford University.

11. MANDEL accepted the invitation. To fulfill this engagement, MANDEL submitted an application in September 1969, for a four-day nonimmigrant visa.

12. But later in that month this application was denied. MANDEL received notice of this action first, orally, from the American Consul in Brussels on October 23, 1969.

13. In a confirmatory letter dated October 30, 1969 (annexed hereto as Exhibit A) the Consul advised MANDEL that he was and since the ruling of the SECRETARY in 1962, has been deemed politically ineligible to receive a visa and that because of alleged violations of visa conditions during the 1968 entry, the SECRETARY had decided not to recommend waiver of ineligibility to the Attorney General. But MANDEL was further advised by the Consul that in connection with a subsequent nonimmigrant visa application submitted on October 22, 1969, the SECRETARY would recommend waiver of ineligibility based on his determination that the alleged violations in 1968 were unintentional since it appeared that MANDEL had not been notified that the issuances of nonimmigrant visas in 1962 and 1968 were pursuant to waivers of political ineligibility and subject to special conditions. This advice was confirmed in a letter dated November 6, 1968, from the Administrator of the Bureau of Security and Consular Affairs to undersigned counsel and annexed hereto as Exhibit B.

14. The October 22, 1969 application was submitted by MANDEL so that he could accept an invitation from some of the AMERICAN PLAINTIFFS and other citizens of the United States. This invitation encompassed the following series of lecturing and speaking engagements:

a. November 29—Public Conference sponsored jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference on "Agencies for Social Change" to be held at the Town Hall in New York City. Scheduled to appear along with MANDEL were Andre Gorz, an editor of *Les Temps Modernes* and Professor Lucien Goldman, Director of Studies at the School of Advanced Practical Studies of the Sorbonne.

b. December 1, Princeton University, Department of Philosophy,

c. December 2, Amherst College, Department of Anthropology.

d. December 3, Columbia University, Department of Philosophy.

e. December 4, Conference sponsored by the Massachusetts Institute of Technology in Boston, on the subject of the "Problems in Conversion from Military to Civilian Production in the

Economy." Included among the nationally known scholars scheduled to participate with MANDEL were Professor Galbraith and Dr. S. E. Luria, Nobel Laureat in Micro-biology.

f. December 5 and 6. Conference at Vassar College, New York. Scheduled to participate with MANDEL were Andre Gorz and Herbert Marcuse.

15. But on December 1, 1969, MANDEL was notified by the American Consul in Brussels of the ATTORNEY GENERAL'S summary and unexplained rejection of the SECRETARY'S waiver recommendation. (This notice is annexed hereto as Exhibit C).

16. On information and belief, the AMERICAN PLAINTIFFS, together with other citizens of the United States, desire to have MANDEL speak at universities and other forums in the United States so that they may hear his views and engage him in a free and open academic exchange. To this end, on information and belief, some of the AMERICAN PLAINTIFFS and other citizens have invited MANDEL to lecture and to participate in a series of conferences at various universities and other public forums in this country in the spring or fall of this year. The AMERICAN PLAINTIFFS involved, however, are prevented from setting the precise date and place of each engagement because of the existing uncertainty regarding the status of MANDEL'S eligibility for receiving a non-immigrant visa and for entry into the United States.

17. On information and belief, MANDEL has accepted this invitation for the spring or fall of 1970. But, on information and belief, in order that MANDEL'S personal and public schedule may be settled and not again suddenly disrupted by a visa denial, he has accepted the AMERICAN PLAINTIFFS' invitation on the condition that he will not be subject to the political ineligibility provision or to the unlimited or arbitrary and discriminatory exercise of discretion by the ATTORNEY GENERAL with respect to the granting or denial of a waiver of political ineligibility.

18. The foregoing statutory provisions, 8 U.S.C. § 1182 (a) (28) and (d)-(3)(A) on their face and as applied, and the determinations of the defendants made under the color of said provisions resulting in the exclusion of MANDEL from the United States in October and December 1969, and in the imminent threat of his being similarly excluded in the spring or fall of 1970, unconstitutionally restrict and abridge the First

and Fifth Amendment rights of the AMERICAN PLAINTIFFS to hear MANDEL in university and other public forums in this country and to exercise their freedom of academic inquiry by engaging MANDEL in an open and face-to-face exchange of information and opinions.

a. Subsections (a)(28) and (d)(3)(A) are void on their face and as applied because they constitute a system of prior restraint on the access of the AMERICAN PLAINTIFFS to hear MANDEL speak and to exchange opinions and information on matters of general public, as well as academic, concern.

b. Subsection (a)(28) is void on its face and as applied because

(i) it predicates ineligibility for receiving a non-immigrant visa to lecture at universities and to attend and speak at scholarly conferences or other public meetings upon the alien's mere belief in or advocacy of or association with others who believe in or advocate unpopular political viewpoints and in the absence of any evidence that the alien would engage in unlawful speech or conduct.

(ii) It denies the AMERICAN PLAINTIFFS of equal protection of the law because it applies to aliens having "leftist" political beliefs and associations, while neither (a)(28) nor any similar provision disqualifies aliens having "rightist" beliefs and associations, such as Nazi Party affiliations from receiving a non-immigrant visa.

(iii) It violates the requirements of due process in failing to provide adequate or any procedural safeguards for making the determination as to political ineligibility under (a)(28).

c. Subsection (d)(3)(A) is void on its face and as applied because

(i) it vests unbridled discretion in the ATTORNEY GENERAL without adequate or any ascertainable standards.

(ii) It violates the requirements of due process in failing to provide for adequate or any procedural safeguards for making the determination with respect to a waiver of political ineligibility.

d. The respective determination of the SECRETARY and ATTORNEY GENERAL relating to MANDEL's past and

future visa applications were and are arbitrary and capricious in violation of the First and Fifth Amendments in that

(i) there is neither substantial evidence nor a basis in fact to support the SECRETARY's determination that MANDEL is politically ineligible to receive a non-immigrant visa; and

(ii) There is neither substantial evidence, a basis in fact, nor a rational ground to support the ATTORNEY GENERAL's rejection in December, 1969 and threatened rejection in the spring or fall of 1970 of the SECRETARY's recommendation that MANDEL's political ineligibility be waived.

19. All of the foregoing statutes, rules, regulations and practices deprive the AMERICAN PLAINTIFFS of their rights to freedom of speech, association, assembly and belief and to their right to the freedom of academic inquiry and discussion, in violation of the First and Fifth Amendments to the Constitution.

20. The plaintiffs have suffered and continue to suffer immediate serious and irreparable injury for which there is no adequate remedy at law, by reason of the operation and enforcement of the aforesaid statutes, rules, regulations and practices, and also particularly as a result of the determinations made by the defendants relating to the past and future applications by MANDEL for a non-immigrant visa and admission into the United States.

21. Unless this Court restrains the enforcement, implementation and operation of the aforementioned unconstitutional statutes, rules, regulations and practices, plaintiffs will continue to suffer the immediate, serious and irreparable injury above set forth.

22. No prior application has been made for the relief requested herein.

WHEREFORE, plaintiffs pray for the following relief against the defendants, their successors and subordinates:

1. That pursuant to 28 U.S.C. §§ 2281, 2282, 2284 a three-judge Federal District Court be immediately convened to hear and determine the merits of this case;

2. That a judgment issue pursuant to 28 U.S.C. §§ 2201, 2202 declaring the constitutional invalidity of 8 U.S.C. § 1182 (a) (28) and (d) (3) (A) on its face and as applied;

3. That a judgment issue pursuant to 28 U.S.C. §§ 2201, 2202 declaring further

a. that the determination of the Secretary of MANDEL's political ineligibility for receiving a non-immigrant visa is illegal and void; and

b. that the ATTORNEY GENERAL's determination to reject the SECRETARY's recommendation of waiver of political ineligibility as to past and future applications by MANDEL for non-immigrant visas is illegal and void;

4. That a preliminary and permanent injunction issue restraining the defendants from enforcing, implementing or operating under 8 U.S.C. § 1582 (a)(28) and (d)(3)(A);

5. That a preliminary and permanent injunction issue directing the defendants to refrain from unconstitutionally withholding or denying MANDEL a non-immigrant visa and permission for admittance into the United States and further directing the defendants to acknowledge their readiness to immediately issue a non-immigrant visa and a permit for admission into the United States to MANDEL for the spring or fall of 1970 upon his request; and

6. That this Court grant such other and further relief as may be just and proper.

RABINOWITZ, BOUDIN &
STANDARD,

By:
LEONARD B. BOUDIN.

Office and Post Office Address:

30 East 42nd Street,
Borough of Manhattan,
City of New York.

Date: March 18, 1970.

EXHIBIT A

EMBASSY OF THE UNITED STATES OF AMERICA,

CONSULAR SECTION,

36 AVENUE DES ARTS,

Brussels 4, October 30, 1969.

Mr. ERNEST E. MANDEL,
127 rue Josse Impens,
Brussels 3.

DEAR MR. MANDEL: This is to confirm the information given to you orally on October 23, 1969, regarding the refusal of a visa to you and the waiver procedure for overcoming temporarily the grounds of refusal.

In March 1962, at the time of your application for a "working journalist" visa to tour the United States, the Department of State ruled that you were ineligible for a visa under Section 212(a)(28) of the Immigration and Nationality Act of 1952, as amended. A reproduction of that section of the INA is enclosed for your information. Until our discussion last week, I had assumed that you had been informed of this refusal.

In 1962 and again in 1968, upon Embassy recommendation, the Department of State and Immigration & Naturalization Service exercised their discretionary authority in giving you the benefit of temporary waivers on the grounds of ineligibility under Section 212(d)(3)(a) of the same Act (extract enclosed). However, last month, the request for a waiver submitted to Washington was denied by the same authorities.

Therefore, in bureaucratic parlance, you were "refused the visa" or "found to be ineligible and inadmissible" in 1962, "benefitted from a waiver" in 1962 and 1968, and were "denied a waiver" in 1969.

Another request for a waiver of the grounds of ineligibility and inadmissibility has been forwarded to the Department of State in connection with your application of October 22 for a visitor's visa to lecture and attend conferences at various institutions. As soon as a reply has been received you will be notified.

I trust that this has clarified the phraseology and the situation. I regret that you were not clearly informed, in 1962, of the refusal and subsequent discretionary procedure being followed.

Very truly yours,

(S) ALTA FOWLER,
American Consul.

Enclosures:

Extracts from Section 212 of Immigration and Nationality Act of 1952, as amended.

IMMIGRATION AND NATIONALITY ACT

(Section 212—Vol. 9—Visas—Part I)

Sec. 212(a)(28) Aliens who are, or at any time have been, members of any of the following classes:

- (A) Aliens who are anarchists;
- (B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advo-

cates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and

prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;¹

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribu-

¹ See p. 96 for provisions of sec. 7, Subversive Activities Control Act of 1950.

tion, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

(I) Any alien who is within any of the classes described in subparagraphs (B), (C), (D), (E), (F), (G), and (H) of this paragraph because of membership in or affiliation with a party or organization or a section, subsidiary, branch, affiliate, or subdivision thereof, may, if not otherwise ineligible, be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials or living and where necessary for such purposes, (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for a visa, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. Any such alien to whom a visa has been issued under the provisions of this subparagraph may, if not otherwise inadmissible, be admitted into the United States if he shall establish to the satisfaction of the Attorney General when applying for admission to the United States and the Attorney General finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and when necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for admission, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. The Attorney General shall promptly make a detailed report to the Congress in the case of each alien

who is or shall be admitted into the United States under (ii) of this subparagraph; ¹

(29) Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950; ²

(30) Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 237(e), whose protection or guardianship is required by the alien ordered excluded and deported;

(31) Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

(b) The provisions of paragraph (25) of subsection (a) shall not be applicable to any alien who (1) is the parent, grandparent, spouse, daughter, or son of an admissible alien, or any alien lawfully admitted for permanent residence, or any citizen of the United States, if accompanying such admissible alien, or coming to join such citizen or alien lawfully admitted, and if otherwise admissible, or (2) proves that he is seeking admission to the United States to avoid religious persecution in the country of his last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against such alien or any group to which he belongs because of his religious faith. For the purpose of ascertaining whether an alien can read under paragraph (25)

¹ See Act of August 20, 1954, p. 100, for certain immunities for persons compelled to testify.

² See p. 96 for provisions of sec. 7, Subversive Activities Control Act of 1950. See Act of August 20, 1954, p. 100, for certain immunities for persons compelled to testify.

of subsection (a), the consular officers and immigration officers shall be furnished with slips of uniform size, prepared under direction of the Attorney General, each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible type, in one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made and shall be required to read and understand the words printed on the slip in such language or dialect.

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b).

(d) (1) The provisions of paragraphs (11) and (25) of subsection (a) shall not be applicable to any alien who in good faith in seeking to enter the United States as a nonimmigrant.

(2) The provisions of paragraph (28) of subsection (a) of this section shall not be applicable to any alien who is seeking to enter the United States temporarily as a nonimmigrant under paragraph (15)(A)(iii) or (15)(G)(V) of section 101(a).

(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) (other than paragraphs (27) and (29)), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (B) who is inadmissible under one or more of the paragraphs enumerated in subsection (a) (other than paragraphs (27) and (29)), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

(4) Either or both of the requirements of paragraph (26) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 238(d).

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.¹

(6) The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of excludable aliens applying for temporary admission under this subsection. The Attorney General shall make a detailed report to the Congress in any case in which he exercises his authority under paragraph (3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28) of subsection (a).

(7) The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26), shall be applicable to any alien who shall leave Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States.² The Attorney General shall by regulations

¹ See Act of July 25, 1958, p. 109, regarding the adjustment of status of certain Hungarian refugees.

See secs. 1, 2, 3, and 4, Act of July 14, 1960 (p. 114), regarding parole of certain refugees. (Secs. 1 and 2 repealed by the Act of October 3, 1965.)

² Sec. 23, Act of July 7, 1958 and sec. 20(b), Act of March 18, 1959 deleted references to Alaska and Hawaii and the latter Act deleted the proviso to the first sentence which read: "Provided, That persons who were admitted to Hawaii under the last sentence of section 8(a) (1) of the Act of March 24,

provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso. Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by section 237(a) of this Act.

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (26), (27), and (29) of subsection (a) of this section.

EXHIBIT B

DEPARTMENT OF STATE,

ADMINISTRATOR,

BUREAU OF SECURITY AND CONSULAR AFFAIRS,

Washington, November 6, 1969.

Mr. LEONARD B. BOUDIN

Attorney at Law,

30 East 42nd Street,

New York, New York 10017.

DEAR MR. BOUDIN: Your letter of October 24 addressed to the Under Secretary has been referred to me for reply in view of his absence from the country. You request that the Under Secretary meet with a group of academicians to discuss the case of Ernest Mandel who was refused a visa by our Embassy at Brussels in September. Mr. Mandel has recently applied for a visa to visit the U.S. to participate in several scholarly conferences and to fulfill a number of speaking engagements.

Under the Immigration and Nationality Act of 1952, Mr. Mandel is ineligible for a visa or for admission to the U.S. because of his affiliation with certain organizations. In 1962 and again in 1968, waivers of ineligibility were sought and obtained from the Attorney General and visas were issued to Mr.

1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of section 101(a) (27) of this Act, other than subparagraph (C) thereof, or unless they were admitted to Hawaii with an immigration visa."

Mandel to enable him to come to the United States to write articles for a Belgian publication and to fulfill speaking engagements. As is usual in such cases, the waivers were granted on the condition that Mr. Mandel conform to his stated itinerary and limit his activities to the stated purposes of his trip. On his 1968 visit, Mr. Mandel engaged in activities beyond the stated purposes of his trip. For this reason, a waiver of ineligibility was not sought in connection with his September visa application.

However, we have now learned that in 1962 and 1968 Mr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and his assurances, given in connection with his current application, that he will conform to his stated itinerary and purposes, we are reconsidering his case and are discussing it with the Department of Justice. As you know, authority to grant waivers of ineligibility in such cases rests solely with the Attorney General.

We are well aware of the interest and concern of the academic community in this matter. And in view of the present status of the case we do not believe a meeting such as you suggest is necessary. I will be happy to inform you promptly of the final decision in the case.

Sincerely,

(S) Barbara M. Watson
BARBARA M. WATSON.

EXHIBIT C

AFowler/MFN/mfn

EMBASSY OF THE UNITED STATES OF AMERICA,
CONSULAR SECTION,
AVENUE DES ARTS 36,
1040 Bruxelles, le 1^r décembre 1969.

Monsieur ERNEST E. MANDEL,
rue Jos. Impens 127,
1030 Bruxelles.

MONSIEUR, Je me réfère à votre demande de visa pour les Etats-Unis et à la demande d'obtenir une dérogation en vertu du par. 212 (d)(3)(a) aux causes d'inéligibilité d'admission trouvées dans votre cas.

Confirmant le message téléphonique qui vous a été remis samedi le 29 novembre dernier par Monsieur Elmendorf, je dois vous informer que la demande de dérogation a été refusée par les autorités à Washington D.C. Je regrette que cet avis ne vous ait pas été communiqué plus tôt, l'Ambassade n'ayant pas été avisée de ce refus avant samedi matin.

Veuillez agréer, Monsieur, l'assurance de ma considération distinguée.

(S) Alta Fowler

ALTA FOWLER,

Consul des Etats-Unis

d'Amérique.

[Caption Omitted]

To the above named Defendants:

You are hereby summoned and required to serve upon Rabinowitz, Boadin & Standard, plaintiff's attorney, whose address is 30 East 42nd Street, New York City, New York 10017 an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

LEWIS ORGEL,

Clerk of Court.

By JAMES R. ABRAM,

Deputy Clerk.

Date: March 19, 1970.

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[Caption Omitted]

AMENDED COMPLAINT

Plaintiffs amend their complaint, as of course, under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure as follows:

1. Page 1, paragraph 1, line 4, after 28 U.S.C. §§ 1331, 1361 insert the following: , 1337.
2. Page 7, paragraph 6.b., line 2, after Brooklyn, New York insert the following: ; Professor Noam Chomsky of the Department of Linguistics, Massachusetts Institute of Technology, residing in Lexington, Massachusetts; Professor Richard A.

Falk of the Center of International Studies, Princeton University, residing in Princeton, New Jersey.

RABINOWITZ, BOUDIN &
STANDARD,

By: Leonard B. Boudin

30 East 24nd Street,
New York, New York 10017;
Telephone: Oxford 7-8640.

Dated: May 11, 1970

[Caption Omitted]

NOTICE OF MOTION

SIR: PLEASE TAKE NOTICE that, upon the annexed affidavit of Leonard B. Boudin, sworn to May 22, 1970, and on the complaint in this action, plaintiffs, by their undersigned counsel, will move this Court at a motion term thereof to be held on the 12th day of June, 1970, at 10:00 A.M. o'clock in the forenoon, at the Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order, pursuant to 28 U.S.C. Sections 2282 and 2284, convening a three-judge District Court to hear and decide the merits of the above entitled action, and for an order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, granting a preliminary injunction restraining the defendants from enforcing, implementing and operating under 8 U.S.C., Section 1182, subsections (a)(28) and (d)(3) (A), and granting plaintiffs such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that defendants are required to serve upon undersigned counsel a copy of their opposing papers and memorandum not later than three days before the return date of this motion.

Dated: New York, N.Y.
May 22, 1970

Yours, etc.,

(S) Leonard B. Boudin.

LEONARD B. BOUDIN,

RABINOWITZ, BOUDIN & STANDARD

30 East 24nd Street,
New York, N.Y. 10017

Attorneys for Plaintiffs.



To:

UNITED STATES ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK,
225 Cadman Plaza East,
Brooklyn, New York.

[Caption Omitted]

STATE OF NEW YORK

County of New York, ss.:

LEONARD B. BOUDIN, being duly sworn, deposes and says:

1. I am a member of the firm of Rabinowitz, Boudin & Standard, attorneys for the plaintiffs in the above entitled action. This affidavit is submitted in support of plaintiffs' annexed motion for the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2282, 2284 and for the issuance of a preliminary injunction restraining defendants from enforcing, implementing and operating under certain provisions of the McCarran Act of 1952 discussed in detail below.

2. All of the facts and circumstances related below are within my personal knowledge, except where I have specifically indicated otherwise.

3. This case arises out of the determination of the defendants to bar from entry into the United States Ernest Mandel, a citizen of Belgium. Mr. Mandel is an internationally noted Marxist scholar in the fields of economic history and theory. He is the editor-in-chief of the Belgian Left Socialist weekly, *La Gauche*. He is also the author of several books, most notably a two volume work entitled *Marxist Economic Theory* (1969), which is considered the major, contemporary work in its field.

Scholars and students in the United States have been increasingly anxious to hear Mr. Mandel speak and to exchange information and ideas with him. Thus, in the fall of 1968, Mr. Mandel accepted invitations to speak from more than 30 universities throughout the United States and Canada. He spoke at, among other universities, Harvard, Berkeley, Swarthmore, Notre Dame, Antioch and Michigan. He made three appearances at Columbia and two at the University of Pennsylvania. In addition, Mr. Mandel gave the keynote address at the 1968 Socialist Scholars Conference held at Rutgers University.

Last year, Mr. Mandel received two separate invitations to speak. These invitations were issued by some of the named

plaintiffs in this action (hereinafter referred to as the "American plaintiffs") who are distinguished and nationally and internationally known scholars and by other citizens of the United States, primarily members of the academic community.

The first invitation sought Mr. Mandel's participation at a conference to be held on October 17-18, 1969 at Stanford University under the co-sponsorship of the University and its Graduate Student Association. (See Exhibit A annexed hereto.) Featured as part of this conference, entitled "Technology and the Third World", was to be an address by Professor John Kenneth Galbraith of Harvard and former Ambassador to India and a second major address the following day by Mr. Mandel. The format was designed to resemble a debate. Mr. Mandel was to participate in a panel discussion after Professor Galbraith's speech, and Professor Galbraith would likewise participate in a panel discussion following Mr. Mandel's speech. (See exhibit B annexed hereto).

The second invitation actually involved a series of requests to speak and lecture at various universities and public forums in late November and early December, 1969. This tour was to begin with Mr. Mandel's participation in seminars at Princeton University on November 26th and 27th. (See Exhibit C annexed hereto.) There was to follow an address on November 29th at Town Hall in New York City as part of a day-long conference on the theme "Agencies of Social Change; Towards a Revolutionary Strategy for Advanced Industrial Countries." This conference was jointly sponsored by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference. The title of Mr. Mandel's speech was "Revolutionary Strategy in the Imperialist Countries." Mr. Mandel was also scheduled to lecture and to participate in seminars under the sponsorship of the Department of Anthropology at Amherst College on December 1st. This invitation was extended by the plaintiff Professor Norman Birnbaum, who requested that in addition to addressing a seminar on Marxist economic theory, Mr. Mandel would be asked to give a general college lecture on the current social and political situation in Western Europe. (See Exhibit D annexed hereto.) Following this, Mr. Mandel's schedule included an appearance at Columbia University at the behest of the Department of Philosophy on December 3rd. The next day, he was to attend a conference sponsored jointly by the Science Action Co-Ordinating Committee and the Fund

for New Priorities in America, to be held at the Massachusetts Institute of Technology. The conference was to last through the 5th, and Mr. Mandel was to participate as a member of a panel to explore the "Problems of Conversion from Military to Civilian Production in the Economy." Among the noted scholars scheduled to participate with Mr. Mandel were Professor Galbraith, Professor Noam Chomsky of M.I.T., and a plaintiff in this action, Professor Daniel P. Moynihan of Harvard and Dr. S. E. Luria, Nobel Laureate in microbiology. (See Exhibit E annexed hereto.) On the evening of the 4th, Mr. Mandel was also scheduled to lecture to the graduate faculty at the New School for Social Research in New York City. (See Exhibit F annexed hereto.) Mr. Mandel's final engagement was to be his attendance at a conference on December 5-6, 1969 at Vassar College. Scheduled to participate along with Mr. Mandel were Andre Gorz, editor of *Les Temps Modernes*, and Professor Herbert Marcuse, of the University of California at San Diego.

4. In connection with the first invitation involving the Stanford University conference, Mr. Mandel submitted an application for a non-immigrant visa dated September 8, 1969 to the American Consul in Brussels. (See Exhibit G annexed hereto). The application sought permission for entry into the United States for six days for the specific purpose of attending the Stanford conference. In answer to questions 30 and 32 on the application with respect to membership in the Communist Party or its affiliates, Mr. Mandel stated, as he had on his previous application in 1968 (See Exhibit R annexed hereto) that he did not hold and had never held such membership. (See Exhibit G).

On October 23, 1969, five days after the end of the Stanford conference, Mr. Mandel received the first notification, verbally, from the Consul, that his application had been denied. No reason was given at that time, nor in a letter dated October 30, 1969 from the Consul to Mr. Mandel confirming the denial. (See Exhibit H annexed hereto). The letter simply cited the State Department's authority under 8 U.S.C. § 1182(a)(28) (hereinafter referred to as the "political exclusionary provision") to exclude aliens because of their unapproved political beliefs or associations.

This cited provision was adopted as part of the comprehensive enactment governing immigration and naturalization,

popularly known as the McCarran Act. The exclusionary provision enumerates three principal classes of aliens who are declared ineligible to receive non-immigrant visas for temporary entry into the United States.

The first class encompasses "anarchists"; the second those who teach or advocate or who are members of or affiliated with organizations which teach or advocate "opposition to all forms of government." 8 U.S.C. § 1182(a)(28)(B).

The chief contribution of the McCarran Act to existing law in the area of political exclusion was the addition of a third classification which forbids issuance of visas to aliens who are members of or affiliated with any Communist Party or its successors and satellites. Included within this class are aliens who advocate "the economic, international and governmental doctrine of world communism or the establishment in the United States of a totalitarian dictatorship" or who are members of organizations that do so. See 8 U.S.C. § 1182(a)(28)(D). Also included are aliens who advocate violent overthrow of the Government of the United States "or of all forms of law". See 8 U.S.C. § 1182(a)(28)(F). Printing, publishing or possessing literature expressing these proscribed views is made a further basis for ineligibility. See 8 U.S.C. § 1182(a)(28)(G).

The Consul's letter also advised Mr. Mandel that he had been considered politically ineligible to receive a nonimmigrant visa since his first application for such a visa in 1962. (See Exhibit I annexed hereto.) In fact, although the Consul admits Mr. Mandel was "not clearly informed" of this, his entry in 1962 as a journalist and in 1968 for his speaking tour was pursuant to a waiver of ineligibility by the Attorney General upon the Secretary of State's recommendation, as provided for by 8 U.S.C. § 1182(d)(3)(A). According to the Consul, a similar recommendation with respect to Mr. Mandel's September, 1969 application was denied.

5. These facts were subsequently confirmed in a letter dated November 6, 1969, from the Administrator of the Bureau of Security and Consular Affairs of the Department of State to plaintiffs' counsel: (See Exhibit J annexed hereto). However, the Administrator added that the waivers of ineligibility in 1962 and 1968 "were granted on the condition that Mr. Mandel conform to his stated itinerary and limit his activities to the stated purposes of his trip." It was alleged by the Administrator

that "[o]n his 1968 visit, Mr. Mandel engaged in activities beyond the stated purpose of his trip." Contrary to the Consul's advice, the Administrator stated that because of this alleged violation "a waiver of ineligibility was not sought in connection with his September visa application."

But the Administrator did specifically confirm the fact that "Mr. Mandel was apparently not informed that a visa was issued (in 1962 and 1968) only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance."

6. On October 24, 1969, Mr. Mandel submitted an application for a non-immigrant visa in order to participate in the various conventions and seminars in late November and early December, 1969. (See Exhibit K annexed hereto). Again, Mr. Mandel answered questions 30 and 32 on the application in the negative. The application was accompanied by letters dated October 23 and 24, 1969 from Mr. Mandel to the American Consul detailing the itinerary of conventions and seminars to the extent that the dates and places were known to him. (See Exhibit L annexed hereto). These letters included specific assurances that he would strictly confine his activities to the stated itinerary.

Mr. Mandel further assured the Consul by letter on November 10, 1969 that he would not appear at any assembly in the United States at which money was solicited for any political cause. This was apparently in response to a charge that he had been present at such a solicitation during his 1968 tour. (See also Exhibit L).

Of course, just as Mr. Mandel had no prior notice that he was required to adhere to a stated itinerary in 1968, so Mr. Mandel was not aware that he was forbidden from appearing where contributions were solicited for political causes. I have been advised by Mr. George Novack, an American citizen, who coordinated Mr. Mandel's 1968 tour, that in fact the event in question was a cocktail reception held at the Gotham Art Theatre in New York City on October 19, 1968. Mr. Mandel addressed the gathering on the events in France during May and June. Later that evening posters by French students were auctioned. The money was sent to aid the legal defense of students who had taken part in the spring demonstrations. Mr. Mandel did not participate in the fund raising. (See Ex. L., Oct. 30, 1969 letter).

With respect to Mr. Mandel's October application, the Administrator in her November 6th letter concluded that based on Mr. Mandel's misunderstanding regarding the basis of prior admissions and "his assurances, given in connection with his current application, that he will conform to his stated itinerary and purposes", the Department would reconsider his case. (See Exhibit J). Upon reconsideration and, as the Department informed concerned organizations, "in the interest of free expression of opinion and exchange of ideas," the Secretary of State requested a waiver of ineligibility for the October 24, 1960 application. (See Exhibit M annexed hereto).

7. On November 29, 1969, however, the day of Mr. Mandel's scheduled speech at Town Hall in New York City, the American Consul in Brussels verbally notified him that the requested waiver of ineligibility had been summarily denied by the Attorney General. This was confirmed by letter dated December 1, 1969, which like the prior verbal communication gave no reason for the Attorney General's action. (See Exhibit N annexed hereto.) While Mr. Mandel was able to address the Town Hall audience through a trans-Atlantic telephone hook-up, the remaining portion of his tour was irreparably interrupted. (A printed copy of Mr. Mandel's Town Hall speech is annexed hereto as Exhibit O.)

8. Two written requests for an explanation directed to the Attorney General by plaintiffs' counsel were ignored. Finally, in response to a third request (see Exhibit P annexed hereto), James F. Greene, Associate Commissioner of the Immigration and Naturalization Service of the Department of Justice (hereinafter referred to as the "INS") advised plaintiffs' counsel that since Mr. Mandel was "ineligible for a visa because of his subversive affiliations" his entry into the United States depended entirely upon approval of the Secretary's recommendation of waiver by the INS, acting in behalf of the Attorney General. (Mr. Greene's letter is annexed hereto as Exhibit Q.) This recommendation was rejected, according to Mr. Greene, because Mr. Mandel's entry in 1968 "was authorized for a series of academic engagements" and "[h]is activities, while here, were much reported in the press and went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized." Although Mr. Greene never specified the "activities" to which he is referring, the "activities" in Mr. Green's view "represented a flagrant abuse of the opportunities

afforded [Mr. Mandel] to express his views in this country." Mr. Greene concluded:

Accordingly, when the recent recommendation was made that he be permitted to enter for a third time, it was concluded that the favorable exercise of discretionary authority provided under the Immigration and Nationality Act was not warranted, and his temporary admission was not authorized.

In answer to counsel's request for further review of the matter, Mr. Greene asserted that "[t]here is no basis for changing this determination."

At no time since has Mr. Mandel or plaintiffs' counsel been notified either by the Secretary of State or the Attorney General of the exact nature of this "flagrant abuse" allegedly committed by Mr. Mandel. Nor has the Attorney General ever provided an explanation for characterizing Mr. Mandel's activities in 1968 as a "flagrant abuse", particularly in view of the Secretary of State's clear finding that Mr. Mandel was probably not aware of the basis of his admission and the conditions of such admission. Mr. Greene's failure to indicate any factual basis which might controvert the Secretary's finding is a conspicuous omission especially since adequate notification of conditions and circumstances of admission was the sole responsibility of the Department of State and within the exclusive knowledge of that Department's officials.

Furthermore, Mr. Greene gives no reason why the Secretary of State erred in accepting Mr. Mandel's assurances that having received sufficient notification of his obligations he would scrupulously abide by the conditions on admission if permitted entry in November, 1969. What but pure caprice could motivate exclusion and prior censorship in the face of Mr. Mandel's pledge that he would not digress from his stated itinerary and that he would neither be present at nor participate in any fund-raising event.

Equally inexplicable except in terms of caprice and discrimination is the apparent conclusion of the Secretary of State and the Attorney General that Mr. Mandel has "subversive affiliation" despite his consistent and unqualified declaration on his 1968 and 1969 visa applications that he is not and has never been a member of or affiliated with the Communist Party or its successors or satellites. (See Exhibits G, K and R). No evidence has ever been presented by the defendants to the contrary because in fact no such evidence exists.

While the various determinations concerning Mr. Mandel made by the defendants which have triggered the operation of the exclusionary provision or resulted in a denial of a waiver are supported by neither substantive nor any evidence, these determinations were also summarily reached without affording Mr. Mandel a hearing at which he would have the opportunity to test the credibility, relevance or materiality of the information which prompted these decisions.

9. Some of the American plaintiffs and other citizens of the United States have issued invitations to Mr. Mandel to participate in seminars and lectures at various universities and public forums during the spring or fall of this year. Because of the fixed determination of the Secretary of State that Mr. Mandel has "subversive affiliations" and is therefore ineligible for a visa under the political exclusionary provision and the Attorney General's equally fixed determination that "favorable exercise of [his] discretionary authority * * * [is] not warranted", the American plaintiffs anticipate that they will again be arbitrarily denied their right to hear and to engage in an academic inquiry with Mr. Mandel. Furthermore, in order that his personal and public schedule may be settled and not again suddenly disrupted, Mr. Mandel has expressly conditioned his acceptance of these future speaking invitations on assurances by the American plaintiffs that the defendants will not again enforce the exclusionary provision against him nor in any other way arbitrarily and discriminatorily bar his entry.

10. The American plaintiffs have commenced this action for the purpose of establishing and enforcing their constitutional right to hear Mr. Mandel and to freely engage in an academic inquiry and exchange of information with him. The exclusionary and waiver provisions of the McCarran Act are challenged as being in violation of the First and Fifth Amendments to the Constitution because on their face and as applied generally and specifically in Mr. Mandel's case, they invest the defendants with a power of arbitrary and absolute censorship over the ideas and information to which the general public as well as the academic community may have access. The exclusion of Mr. Mandel also presents a case of individual discriminatory exclusion since the basis for the defendants' action, barring his entry is entirely without substantial or any supporting evidence, was made without essential procedural safeguards designed to mini-

mize the effect of the censorship apparatus installed by the McCarran Act and was in every sense a purely capricious exercise of discretion.

11. Preliminary injunctive relief is sought by the instant motion because the American plaintiffs are suffering and will continue to suffer irreparable impairment and denial of the First Amendment rights. Until the rights of the plaintiffs are declared and enforced they will be unable to make the necessary and appropriate plans for Mr. Mandel's upcoming public and university appearances. The certain action by the defendants under the challenged provisions of the McCarran Act to bar Mr. Mandel from meeting with American scholars and students, like the defendants' actions in 1969, makes it impossible for plaintiffs to carry on fund-raising, make financial arrangements, issue publicity, and set definite dates, times and places for Mr. Mandel's appearances in this country. Quite clearly the American plaintiffs cannot constitutionally be placed in the position of having undertaken the difficult and expensive task of planning for these appearances only to be subject to the summary, abrupt and whimsical determination of the defendants to deny their First Amendment rights by barring Mr. Mandel's entry into the country.

12. No prior application has been made for the relief requested by the annexed motion.

(S) Leonard B. Boudin

LEONARD B. BOUDIN.

SWORN to before me this 22nd day of May, 1970.

(S) Theresa Silverstein,

THERESA SILVERSTEIN,

Notary Public, State of New York,

No. 31-3673040

Qualified in New York County,

Commission Expires March 30, 1971.

EXHIBIT A

STANFORD UNIVERSITY,

Stanford, Calif., August 20, 1969.

Mr. ERNEST MANDEL,
Brussels 3,
127 Rue Josse Impens,
Belgium.

DEAR MR. MANDEL: Stanford University heartily endorses the invitation extended to you by the Graduate Student Asso-

ciation to speak at the conference on "Technology and the Third World" on October 17 and 18, 1969. I hope very much that you can accept, and we shall do our best to make you welcome here.

With best wishes.

Sincerely yours,

(S) Frederic O. Glover

FREDERIC O. GLOVER,

Executive Assistant to the President.

cc: Mr. Richard B. Miles

EXHIBIT B

STANFORD UNIVERSITY,

Stanford, Calif., August 20, 1969.

Prof. ERNEST MANDEL,

127 Rue Josse Impens,

Brussels 3, Belgium.

DEAR PROFESSOR MANDEL: The Stanford Graduate Student Association is sponsoring a conference entitled "Technology and the Third World" on October 17 and 18. Professor John Kenneth Galbraith has agreed to present the keynote speech on Friday night, October 17, to begin the conference. His speech will be followed by discussion with a panel composed of people with differing opinions. The conference will continue all day Saturday, October 18, commencing with another major address and followed by a similar discussion. Late Saturday morning we will have a panel confront the problem of transferring technology to Peru, and Saturday afternoon a number of panels will discuss various related problems.

We would like you to deliver the Saturday address and participate on the panel following Galbraith's speech. We expect that, similarly, Galbraith will participate on the panel following your speech.

The purpose of this conference is to deal with the problems and the interpretations of the problems surrounding the interaction of technically advanced countries with underdeveloped countries. We expect to discuss such things as by what methods should technology be transferred and what are the effects on the underdeveloped country of different methods of transference? How should education be dealt with? Is it the responsibility of developed countries to educate or is it a form of

exploitation? Does a population problem exist and is it a technical problem? Et cetera.

The Stanford community has been involved in Peru through the Business School, Stanford Research Institute, Peace Corps, and individual experiences. We plan to use this expertise to examine in depth the problems of the development of Peru with the expectation that many of the problems encountered there are the types of problems found in development throughout the Third World.

We certainly will be honored if you can come. We are prepared to offer you \$1,000 to cover travel and incidentals. Your opinions will provide a contrast to those of Professor Galbraith and others participating.

Sincerely,

(S) Richard B. Miles

Chairman, Graduate Student Association.

cc: President K. S. Pitzer

Dr. H. Donald Winbigler

EXHIBIT C

DEPARTMENT OF PHILOSOPHY,
1879 HALL, PRINCETON UNIVERSITY,
Princeton, N.J., September 29, 1969.

PROF. ERNEST MANDEL,
127 Rue Josie Impens,
Brussels 3, Belgium.

DEAR PROFESSOR MANDEL: I write to ask you to speak at two colloquia here at Princeton during your visit to this country. There are a number of us here who are very much interested in your work and greatly look forward to the opportunity of talking to you. The first colloquium, attended by a group of about 30 graduate students and faculty, is sponsored by the Program in Political Philosophy of which I am the chairman. The second is a 15-member faculty seminar on European Studies, directed by Professor Nicholas Wahl. In each, the usual program is a talk of about an hour in length followed by discussion for an hour. We could arrange to have the colloquia on successive days sometime before December 11.

Professor Wahl tells me that the European Studies Seminar would be very interested to hear your assessment of the pros-

pects of Marxism in Europe. For the Political Philosophy group, I think that a rather more theoretical discussion would be suitable. But the choice of topic is of course left entirely to you. We are able to offer an honorarium of \$250. In addition we would, of course, arrange accommodation for you in Princeton and defray your expenses in traveling to and from Princeton.

I do very much hope that you will be able to accept.

Yours sincerely,

(S) Stuart Hampshire
STUART HAMPSHIRE,
Chairman.

EXHIBIT D

AMHERST COLLEGE,

Amherst, Massachusetts • 01002, October 16, 1969.

Mr. ERNEST MANDEL,
127 Rue Josse Impens,
Bruxelles 3, Belgium.

DEAR MR. MANDEL: I gather from colleagues in other universities that you are planning a trip to the United States in November. I am writing on behalf of the Department of Sociology to invite you to visit Amherst College. We would be prepared to pay for your travel expenses from New York and to offer you an honorarium of \$150 if you would agree to make a presentation to one of our advanced seminars. The theme of this year's seminar is, in fact, Marxism and in particular we would be very pleased to hear from you in connection with your work on Marxist economic theory. I am also authorized to inquire as to whether you would be prepared, in addition to your seminar presentation, to address a larger group of students in a general college lecture. In this case we would ask you to speak on the current social and political situation in Western Europe.

I would be very glad for an early reply, at which point we can proceed to set an exact date.

Yours sincerely,

(S) Norman Birnbaum
NORMAN BIRNBAUM,
Professor of Sociology.

NB: jm

EXHIBIT E

SCIENCE ACTION CO-ORDINATING
COMMITTEE,
WALKER MEMORIAL BUILDING, ROOM 316
MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
CAMBRIDGE, MASS. 02139,
(617) 491-8117,
October 16, 1969.

Dr. ERNST MANDEL,
127, rue Josse Impéris,
Brussels 3, Belgium.

DEAR DR. MANDEL: On behalf of the Science Action Co-ordinating Committee, (SACC) and the Fund for New Priorities in America, I would like to invite you to participate in a National Conference on Social and Economic Conversion, sponsored jointly by the two organizations, to be held in Cambridge at MIT on December 3, 4 and 5 of this year. SACC, composed primarily of undergraduate and graduate students at MIT, conceived of and co-sponsored last spring's March 4 research stoppage protesting society's misuse of science and technology. The Fund for New Priorities has sponsored conferences in Washington on the Military Budget, on National Priorities and on Destruction of the Environment.

Much of the present political, social and economic activity is misdirected, wasteful or destructive, and does not respond to the needs of large segments of society. Conversion to a society that constructively and effectively satisfies the needs of all its members entails changing both the awareness of individuals and the structure of their political, social and economic institutions. This conception differs radically both in nature and in extent from the restricted view that conversion is simply adjustment of the economy to disarmament. It is the larger conception of conversion that the Conference will address.

An outline of the Conference schedule is enclosed. I would like to invite you to participate as one of the panelists in the Thursday sessions, morning and afternoon, dealing with economic aspects of conversion. We are planning both these sessions around a ten-member-panel, in which we have invited the following others to participate: J.K. Galbraith and Samuel Bowles, economists; Noam Chomsky, political and social analyst; Seymour Melman, authority on conversion; J.B.

Neilands, authority on ecology and environment; D.P. Moynihan, authority on urban affairs; Kenneth Cockrel, lawyer for minority groups; Harvey Swados, writer; and Susan Sontag, writer and critic. Each session will open with four ten-minute presentations to the panel. The morning presentations, dealing with affluent sectors of the economy, will be made by a representative of management, a union representative, a member of one of the militant union caucuses, and a member of SACC; the afternoon presentations, dealing with depleted sectors of the economy, will be made by a union organizer from agriculture; a participant involved in health and medical care, a third participant to be chosen, and a member of SACC. We plan the panel discussion departing from each set of presentations to last about two hours, to be followed by questions from the floor. We feel that an analysis of the social and economic structure of the United States from your particular perspective would complement those of the other participants and be of great value to the Conference.

The session of Thursday evening December 4 is planned as a set of concurrent informal seminars on various aspects of conversion given by participants in the Conference. We hope that, in addition to your participation on the panel, you would be interested in presenting one such seminar on a topic of your choice.

We expect those attending the Conference to include members of the MIT and the greater Boston academic community; residents of the Boston area, industrial and scientific workers from the New England area; and economists and legislators from Washington. We hope to televise at least some of the sessions, and the proceedings will appear in book form after the Conference. We will, of course, assume your travel expenses in the United States and arrange accommodation in Cambridge.

We are very eager to have your participation in the Conference. We hope you will be able to accept this invitation, and to let us know as soon as possible whether you plan to attend. I will be happy to answer any questions or supply more information.

Yours sincerely,
(S) ETHAN SIGNER,

for SACC.

EXHIBIT F

THE GRADUATE FACULTY, NEW SCHOOL FOR
SOCIAL RESEARCH, 65 FIFTH AVENUE, NEW
YORK, N.Y. 10003, MAILING ADDRESS: 66 WEST
12TH STREET, NEW YORK, N.Y. 10011, OREGON
5-2700.

DEPARTMENT OF ECONOMICS

October 1, 1969.

Dr. ERNEST MANDEL,
127 rue Josee Impens,
Brussels 3, Belgium.

DEAR DR. MANDEL: I understand from Arthur Felderbaum that you will be in the United States this winter, and I am writing because we would like very much to arrange for you to give a lecture here at the New School.

Would it be possible to make a tentative engagement with you for December 4th—a Thursday evening—at 8:00 o'clock? I am afraid that we can only offer \$100 as an honorarium, but I can promise you a most attentive and interested audience. In addition, I look forward very much to the pleasure of making your acquaintance. As you probably know, I admire your book on Marxian theory very much.

Sincerely,

(S) Robert L. Heilbroner
ROBERT L. HEILBRONER,
Chairman.

RLH: 1b

EXHIBIT G

155647-17437

Prior () Tit No. _____
 Expires Q 1972
 Loc _____ Loc _____ OAC _____
 Chs _____ From _____ Rtd _____ By _____ Rcd _____
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 B-1 B-2 B-1 B-2
 Interviewed by CAF
 Issued by _____
 Issued on _____
 For Multiple or _____ Appls.
 During 48 mos. or _____ mos.

FS 495

INSCRIVEZ PAS DANS L'ESPACE CI-DESSUS RESERVE AU SERVICE

1. NOM DE FAMILLE <u>MANDEL</u>		PRENOM USUEL <u>Eduard</u>		AUTRES PRENOMS <u>ESRA</u>	
2. AUTRES NOMS COMPRENSIF NOM DE JEUNE FILLE, DE DIVORCE, PSEUDONYM, ETC.				3. NATIONALITE <u>BELGE</u>	
4. LIEU DE NAISSANCE (Ville, Département, Pays) <u>Bruxelles, 10 rue de la Chapelle</u>				5. DATE DE NAISSANCE (Jour, Mois, Année) <u>5 4 1923</u>	
6. DOIGT <u>Doigt, 10 rue de la Chapelle</u>				TELEPHONE <u>16.95.43</u>	
8. ADRESSE COMMERCIALE				9. TELEPHONE	
10. PROFESSION <u>Travailleur</u>				11. SEXE <u>Homme</u>	
12. CHEVEUX (Couleur) <u>Châtain</u>	13. YEUX (Couleur) <u>Vert</u>	14. TAILLE <u>1m 81</u>	15. TEINT (Clair, Coloré, etc.) <u>Brûlé</u>		
16. SIGNES PARTICULIERS (Cicatrices, tatouages, etc.) <u>Ruée de la Chapelle</u>					
17. SITUATION DE FAMILLE <input checked="" type="checkbox"/> Marié <input type="checkbox"/> Célibataire <input type="checkbox"/> Veuf <input type="checkbox"/> Divorcé (le)					
19. BUT DU VOYAGE AUX ETATS-UNIS (Tourisme, affaires, visite de la famille ou des amis, etc.) <u>Conférence à l'Université de Stanford (visite de la famille)</u>					
18. DUREE DU SEJOUR ENVISAGE AUX ETATS-UNIS <u>6 jours</u>			20. DATE APPROXIMATIVE DU DEPART POUR LES ETATS-UNIS <u>14 octobre 1969</u>		
21. QUI COUVRIRA VOS FRAIS DE TRANSPORT ET DE SEJOUR? (Vous-même, votre société, votre frère ou sœur, etc.) <u>Stanford University (voir lettre jointe)</u>					
22. VOUS ENVOYER-IL UN DOCUMENT AUX ETATS-UNIS? <input type="checkbox"/> Oui <input checked="" type="checkbox"/> Non			23. VOUS ENVOYER-IL UN DOCUMENT A VOTRE PAYS D'ORIGINE? <input type="checkbox"/> Oui <input checked="" type="checkbox"/> Non		

24. INDIQUEZ OÙ ET AP. JAIMATIVEMENT QUAND VOUS AVEZ DEMANDE POUR LA DERNIERE FOIS UN VISA POUR LES ETATS-UNIS

en L 1966

25. PRECISEZ

☒ Visa accordé

☐ Visa refusé

☐ Demande abandonnée

26. AVEZ-VOUS JAMAIS DEMANDE UN VISA D'IMMIGRATION POUR LES ETATS-UNIS ?

☐ Oui

☒ Non

27. DEPUIS COMBIEN DE TEMPS VIVEZ-VOUS DANS LE PAYS OÙ VOUS FAITES VOTRE DEMANDE ?

28. ENUMEREZ LES PAYS, AUTRES QUE CELUI DANS LEQUEL VOUS FAITES VOTRE DEMANDE, DANS LESQUELS VOUS AVEZ YECU, PENDANT PLUS D'UN AN AU COURS DES CINQ DERNIERES ANNEES ET LES DATES APPROXIMATIVES DE CES RESIDENCES

Pays

Dates Approximatives

29. A QUELLE ADRESSE DESIREZ-VOUS QUE VOTRE VISA ET VOTRE PASSEPORT SOIENT ENVOYES ?

27 rue des Luperon, Marseille

30. AVIS IMPORTANT: La législation des Etats-Unis interdit la délivrance d'un visa de visiteur à toute personne qui a l'intention de s'établir dans le pays d'une façon permanente ou pour une période illimitée. Toute personne admise aux Etats-Unis avec un visa temporaire ne peut que s'y livrer aux activités pour lesquelles ce visa a été délivré. Un visiteur ne peut travailler. La législation des Etats-Unis interdit la délivrance de tout visa à toute personne atteinte d'une maladie contagieuse dangereuse, telle que la tuberculose, qui a souffert d'une maladie mentale sévère, qui est toxicomane ou se livre au trafic des stupéfiants; qui a des antécédents judiciaires; compris tout délit envers la morale publique, ou qui est ou a été membre du parti communiste ou de toute organisation affiliée, à moins que ces motifs d'exclusion n'aient fait préalablement l'objet d'une dispense spéciale. Au cas où l'une des restrictions énumérées ci-dessus s'appliquerait à vous, il est recommandé que vous vous présentiez dans nos bureaux pour une entrevue personnelle. Si cela n'est pas possible dès maintenant, une correspondance détaillant les faits vous concernant devrait être jointe à votre demande et nous être adressée. Dans certains cas, il est possible d'obtenir une dispense des restrictions prévues. Des renseignements sur ce point, et sur toute autre question en matière de visas, peuvent être obtenus en téléphonant, en vous présentant, ou en écrivant à nos services.

31. AVEZ-VOUS LU ET COMPRENEZ-VOUS BIEN LES INDICATIONS DONNEES AU PARAGRAPHE 30 DE CETTE FORMULE ?

☒ Oui

☐ Non

32. L'UNE QUELCONQUE DES RESTRICTIONS ENUMEREES AU PARAGRAPHE 30 S'APPLIQUE-T-ELLE A VOUS ?

☐ Oui

☒ Non

LE CAS ECHEANT, DONNEZ TOUS DETAILS SUR UNE FEUILLE JOINTE

33. Un visa accordé à toute personne ayant, en pleine connaissance de cause, donné de faux renseignements dans sa demande de visa est susceptible d'être annulé soit avant soit après l'arrivée aux Etats-Unis. Toute personne ayant fourni de tels faux renseignements est inapte à l'avenir à recevoir un visa.

34. Je certifie que les réponses que j'ai données sur cette formule sont exactes pour autant que je sache. De plus, je reconnais que la possession d'un visa n'assure pas au titulaire, l'entrée aux Etats-Unis et, lors de son arrivée au port d'entrée, il est établi que le titulaire ne peut être admis.

8 septembre 1969

Date

Ernest Marché

Signature

(N'ECRIVEZ PAS DANS CET ESPACE RESERVE AU SERVICE)

EXHIBIT H

See Exhibit "A" attached to complaint, supra. pp. 13-21.

EXHIBIT I

FAMILY NAME		GIVEN NAME		MIDDLE NAME	TRAVEL DOCUMENT
HOME ADDRESS					
PLACE AND DATE OF BIRTH					
HAIR	EYES	HEIGHT	WEIGHT	NATIONALITY	MARKS
MARITAL STATUS	SEX	RACE	LENGTH AND PURPOSE OF STAY IN U. S.		
<input type="checkbox"/> M <input type="checkbox"/> S	<input type="checkbox"/> M	ETHNIC CLASS	Reporting - one month		
<input type="checkbox"/> W <input type="checkbox"/> D	<input type="checkbox"/> F				

I understand that possession of a visa does not entitle the bearer to enter the U.S. if upon arrival at a port of entry he is found inadmissible. I declare that the information contained in this application, including any statements made a part thereof, has been examined by me and is true and complete to the best of my knowledge and belief.

Signature of Applicant: Gordon Cornell

Applicant interviewed by me and application signed before me on: March 1, 1960

At: Brussels, Belgium

FORM 3-61 75-257 Gordon Cornell Gordon Cornell

GPO : 1957 : O-359972 FORM APPROVED. BUDGET BUREAU NO. 47-437-10


CLASSIFICATION	POST SERIAL NO.	REMARKS
1	212-2160	212(d)(3)(A)(28)
ISSUED ON	FOR	
VALID THROUGH	REFUSED ON	
SERVICE NO.		
TARIFF ITEM NO.		
FEE PAID: U. S. \$		
LOCAL CY. EQUIVALENT		
APPLICATION FOR NONIMMIGRANT VISA AND ALIEN REGISTRATION		

EXHIBIT J

DEPARTMENT OF STATE,
BUREAU OF SECURITY AND CONSULAR AFFAIRS,
Washington, November 6, 1969.

Mr. LEONARD B. BOUDIN,
*Attorney at Law,
30 East 42d Street,
New York, N.Y. 10017.*

DEAR MR. BOUDIN: Your letter of October 24 addressed to the Under Secretary has been referred to me for reply in view of his absence from the country. You request that the Under Secretary meet with a group of academicians to discuss the case of Ernest Mandel who was refused a visa by our Embassy at Brussels in September. Mr. Mandel has recently applied for a visa to visit the U.S. to participate in several scholarly conferences and to fulfill a number of speaking engagements.

Under the Immigration and Nationality Act of 1952, Mr. Mandel is ineligible for a visa or for admission to the U.S. because of his affiliation with certain organizations. In 1962 and again in 1968, waivers of ineligibility were sought and obtained from the Attorney General and visas were issued to Mr. Mandel to enable him to come to the United States to write articles for a Belgian publication and to fulfill speaking engagements. As is usual in such cases, the waivers were granted on the condition that Mr. Mandel conform to his stated itinerary and limit his activities to the stated purposes of his trip. On his 1968 visit, Mr. Mandel engaged in activities beyond the stated purposes of his trip. For this reason, a waiver of ineligibility was not sought in connection with his September visa application.

However, we have now learned that in 1962 and 1968 Mr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and his assurances, given in connection with his current application, that he will conform to his stated itinerary and purposes, we are reconsidering his case and are discussing it with the Department of Justice. As you know, authority to grant waivers of ineligibility in such cases rests solely with the Attorney General.

[See p. 48 for conclusion of letter]

EXHIBIT K

Ppt or () Tit No. 1185/67Expires 1/1/70 19 70LOB LOC OAC

Chk From Rqtd By Rcd

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Interviewed by 1/1/70Issued by 1/1/70Issued on 1/1/70For Multiple or 1/1/70 Appls.During 48 mos. or 1/1/70 mos.

(N'ECRIVEZ PAS DANS L'ESPACE CI-DESSUS RESERVE AU SERVICE)

1. NOM DE FAMILLE		PRENOM USUEL		AUTRES PRENOMS	
<u>M. M. M.</u>		<u>M. M. M.</u>		<u>M. M. M.</u>	
2. AUTRE(S) NOM(S) (Y COMPRIS LE NOM DE JEUNE FILLE, PSEUDONYME, ETC.)				3. NATIONALITE	
<u>M. M. M.</u>				<u>M. M. M.</u>	
4. LIEU DE NAISSANCE (Ville, Département, Pays)				5. DATE DE NAISSANCE (Jour, Mois, Année)	
<u>M. M. M.</u>				<u>M. M. M.</u>	
6. DOMICILE				7. TELEPHONE	
<u>M. M. M.</u>				<u>M. M. M.</u>	
8. ADRESSE COMMERCIALE				9. TELEPHONE	
<u>M. M. M.</u>				<u>M. M. M.</u>	
10. PROFESSION				11. SEXE	
<u>M. M. M.</u>				<u>M. M. M.</u>	
12. CHEVEUX (Couleur)	13. YEUX (Couleur)	14. TAILLE	15. TEINT (Clair, Coloré, etc.)		
<u>M. M. M.</u>	<u>M. M. M.</u>	<u>M. M. M.</u>	<u>M. M. M.</u>		
16. SIGNES PARTICULIERS (Cicatrices visibles, etc.)					
<u>M. M. M.</u>					
17. SITUATION DE FAMILLE					
<input type="checkbox"/> Marié(e) <input type="checkbox"/> Célibataire <input type="checkbox"/> Veuf(ve) <input type="checkbox"/> Divorcé(e)					
18. BUT DU VOYAGE AUX ETATS-UNIS (Tourisme, affaires, visite à la famille ou à des amis, etc.)					
<u>M. M. M.</u>					
19. DUREE DU SEJOUR ENVISAGE AUX ETATS-UNIS			20. DATE APPROXIMATIVE DU DEPART POUR LES ETATS-UNIS		
<u>M. M. M.</u>			<u>M. M. M.</u>		
21. QUI COUVRIRA VOS FRAIS DE TRANSPORT ET DE SEJOUR ? (Vous-même, votre société, votre frère ou sœur, etc.)					
<u>M. M. M.</u>					
22. VOTRE CONJOINT SE TROUVE-T-IL AUX ETATS-UNIS ?			23. VOTRE PERE OU VOTRE MERE EST-IL (ELLE) AUX ETATS-UNIS ?		
<input type="checkbox"/> Oui <input type="checkbox"/> Non			<input type="checkbox"/> Oui <input type="checkbox"/> Non		

24. INDIQUEZ OÙ ET APPROXIMATIVEMENT QUAND VOUS AVEZ DEMANDÉ POUR LA DERNIÈRE FOIS UN VISA POUR LES ÉTATS-UNIS

25. PRÉCISEZ

☐ Visa accordé

☐ Visa refusé

☐ Demande abandonnée

26. N'AVEZ-VOUS JAMAIS DEMANDÉ UN VISA D'IMMIGRATION POUR LES ÉTATS-UNIS

☐ Oui

☐ Non

27. DEPUIS COMBIEN DE TEMPS VIVEZ-VOUS DANS LE PAYS OÙ VOUS FAITES VOTRE DEMANDE

28. ÉNUMÉREZ LES PAYS, AUTRES QUE CELUI DANS LEQUEL VOUS FAITES VOTRE DEMANDE, DANS LESQUELS VOUS AVEZ VÉCU PENDANT PLUS D'UN AN AU COURS DES CINQ DERNIÈRES ANNÉES ET LES DATES APPROXIMATIVES DE CES RÉSIDENCES

Pays

Dates Approximatives

29. À QUELLE ADRESSE DESIREZ-VOUS QUE VOTRE VISA ET VOTRE PASSEPORT SOIENT ENVOYÉS

30. AVIS IMPORTANT: La législation des États-Unis interdit la délivrance d'un visa de visiteur à toute personne qui a l'intention de s'établir dans le pays d'une façon permanente ou pour une période illimitée. Toute personne admise aux États-Unis avec un visa temporaire ne peut que s'occuper des activités pour lesquelles ce visa a été délivré. Un visiteur ne peut travailler. La législation des États-Unis interdit la délivrance de tout visa à toute personne atteinte d'une maladie contagieuse dangereuse, telle que la tuberculose; qui a souffert d'une maladie mentale sérieuse; qui est toxicomane ou se livre au trafic des stupéfiants; qui a des antécédents judiciaires; compris tout délit envers le morale publique, ou qui est ou a été membre du parti communiste ou d'une autre organisation affiliée, à moins que ces motifs d'exclusion n'aient fait préalablement l'objet d'une dispense spéciale. Au cas où l'une des restrictions énumérées ci-dessus s'appliquerait à vous, il est suggéré que vous vous présentiez dans nos bureaux pour une entrevue personnelle. Si cela n'est pas possible dès maintenant, une déclaration détaillant les faits vous concernant devrait être jointe à votre demande et nous être adressée. Dans certains cas, il est possible d'obtenir une dispense des restrictions prévues. Des renseignements sur ce point, et sur tout autre question en matière de visas, peuvent être obtenus en téléphonant, en vous présentant, ou en écrivant à nos services.

31. AVEZ-VOUS LU ET COMPRENEZ-VOUS BIEN LES INDICATIONS DONNÉES AU PARAGRAPHE 30 DE CETTE FORMULE ?

☒ Oui

☐ Non

32. L'UNE QUELCONQUE DES RESTRICTIONS ÉNUMÉRÉES AU PARAGRAPHE 30 S'APPLIQUE-T-ELLE À VOUS ?

☐ Oui

☒ Non

LE CAS ÉCHEANT, DONNEZ TOUS DÉTAILS SUR UNE FEUILLE JOINTE

33. Un visa accordé à toute personne, ayant, en pleine connaissance de cause, donné de faux renseignements dans sa demande de visa est susceptible d'être annulé soit avant soit après l'arrivée aux États-Unis. Toute personne ayant fourni de tels faux renseignements est inapte à l'avenir à recevoir un visa.

34. Je certifie que les réponses que j'ai données sur cette formule sont exactes pour autant que je sache. De plus, je reconnais que la possession d'un visa n'assure pas au titulaire l'entrée aux États-Unis et, lors de son arrivée, en port d'entrée, il est établi que le titulaire ne peut être admis.

23.10.1968

Date

Signature

(N'ÉCRIVEZ PAS DANS CET ESPACE RÉSERVÉ AU SERVICE)

EXHIBIT L

ERNEST MANDEL

121, rue des Indes
BRUXELLES 3
TEL. 16.86.43

BRUXELLES, le 23 octobre 1969.

Au Conseil des "Liaisons d'Amérique à Bruxelles".

Madame,

Voici la liste probable des conférences que je donnerai pendant
le voyage prévu aux Etats-Unis:

- 25 novembre: Université de Princeton, Département de Philosophie,
"Précursus in Political Philosophy".
- 27 novembre: Université de Princeton, Département de Philosophie,
"Faculty Seminar on European Studies".
- 28 et 29 novembre: Conférence organisée conjointement par la Social-
ist Scholars Conference et la Bertrand Russell Peace
Foundation sur les sujets "Agencies for Revolutionary
Change".
- 30 novembre: Amherst College.
- 3, 4 et 5 décembre: Massachusetts Institute of Technology, Sciences
Policy Action Co-ordinating Committee.
- Le soir du 4 décembre retour à New York pour une conférence à la
Graduate Faculty, New School for Social Research, New York.

Une invitation pour l'Université de Columbia a été annoncée mais pas
encore reçue; elle se situerait au 1 ou 2 ou 5 décembre.

Pour le moment, je ne peux pas être plus précis, comme certains des

autres, mais j'ai pu rendre des conférences d'initiative par

moi-même, sous une condition pour l'obtention du visa, j'ai

1° le 23 octobre, à l'Université de Princeton, la liste définitive de mes

2° le 24 octobre, à l'Université de Princeton, même si les Universités

3° le 25 octobre, à l'Université de Princeton, en public à l'occasion d'un

4° le 26 octobre, à l'Université de Princeton, en public à l'occasion d'un

5° le 27 octobre, à l'Université de Princeton, en public à l'occasion d'un

6° le 28 octobre, à l'Université de Princeton, en public à l'occasion d'un

7° le 29 octobre, à l'Université de Princeton, en public à l'occasion d'un

8° le 30 octobre, à l'Université de Princeton, en public à l'occasion d'un

9° le 31 octobre, à l'Université de Princeton, en public à l'occasion d'un

10° le 1er novembre, à l'Université de Princeton, en public à l'occasion d'un

11° le 2er novembre, à l'Université de Princeton, en public à l'occasion d'un

12° le 3er novembre, à l'Université de Princeton, en public à l'occasion d'un

13° le 4er novembre, à l'Université de Princeton, en public à l'occasion d'un

14° le 5er novembre, à l'Université de Princeton, en public à l'occasion d'un

15° le 6er novembre, à l'Université de Princeton, en public à l'occasion d'un

16° le 7er novembre, à l'Université de Princeton, en public à l'occasion d'un

17° le 8er novembre, à l'Université de Princeton, en public à l'occasion d'un

18° le 9er novembre, à l'Université de Princeton, en public à l'occasion d'un

19° le 10er novembre, à l'Université de Princeton, en public à l'occasion d'un

20° le 11er novembre, à l'Université de Princeton, en public à l'occasion d'un

21° le 12er novembre, à l'Université de Princeton, en public à l'occasion d'un

ERNEST MANDEL
121, rue des Indes
BRUXELLES 3
TEL. 16.86.43

BRUXELLES, le 24 octobre 1969.

Au Conseil des "Liaisons d'Amérique à Bruxelles".

Madame,

Tout d'abord à l'adresse indiquée dans ma note du 23
octobre, en vue d'obtenir un visa pour les Etats-Unis en novembre-dé-
cembre, il y a quelques modifications:

- 1.- J'ai reçu une invitation pour Vassar, que j'ai accepté pour le 2
5 et 6 décembre.
- 2.- Je ne serai à MIT que le 4 décembre.
- 3.- La conférence à Amherst a été déplacée du 30 novembre (un dimanche)
vers le 1er décembre.

Sincèrement vôtre,

Ernest Mandel

ERNEST MANDEL
127, RUE JOSEPHINE
BRUXELLES 3
TEL. 1995 43

BRUXELLES, le 30 octobre 1969.

Mme Feder,
Conseil des Etats-Unis,
à Bruxelles.

Madame,

Pour appuyer mon demande d'un visa d'entrée aux Etats-Unis en vue de tenir les conférences universitaires auxquelles j'ai été invité fin novembre-début décembre, je désire porter à votre connaissance que je m'engage à ne pas faire des collectes à aucune fin, et à ne pas être présent à des meetings ou de telles collectes se tiennent, pendant mon séjour aux Etats-Unis.

Je profite de l'occasion pour vous signaler que lors de ma dernière visite aux Etats-Unis, je n'ai pas non plus fait de telles collectes. Il est exact que j'ai pris la parole à une réunion privée, où eut lieu une vente-aux-enchères d'affiches françaises, au profit des étudiants français en prison à cette époque, mais je n'ai pas participé moi-même, de quelque manière que ce soit, à cette vente. Si c'est une cause de refus de mon visa, je m'engage à ne pas être présent à de telles réunions lors de mon prochain voyage aux Etats-Unis.

Je vous prie de bien vouloir communiquer cela au State Depart-

Ernest Mandel

ment. Dans la lettre précédente dans laquelle je m'engageais à ne pas faire de telles collectes, j'avais écrit : "avant mon départ".

Croyez, Madame, à mes sentiments distingués.

BRUXELLES, le 30 octobre 1969.

Très respectueusement,

Ernest Mandel

Je vous prie de bien vouloir communiquer cela au State Depart-

Ernest Mandel

Très respectueusement,

[This is conclusion of letter appearing on p. 43]
 We are well aware of the interest and concern of the academic community in this matter. And in view of the present status of the case we do not believe a meeting such as you suggest is necessary. I will be happy to inform you promptly of the final decision in the case.

Sincerely,

(S) Barbara M. Watson
 BARBARA M. WATSON.

EXHIBIT M

DEPARTMENT OF STATE,
 Washington, D.C. 20520.

BERTRAND RUSSELL PEACE FOUNDATION,
 156 Fifth Avenue, Suite 1003,
 New York, N.Y. 10010.

JANUARY 27, 1970.

DEAR GENTLEMEN: I refer to your interest in the visa application of Ernest Mandel.

Under the Immigration and Nationality Act of 1952, Mr. Mandel is ineligible for a visa or for admission to the United States because of his affiliation with certain organizations. In 1962 and again in 1968, waivers of ineligibility were sought and obtained from the Attorney General and visas were issued to Mr. Mandel to enable him to come to the United States to write articles for a Belgian publication and to fulfill speaking engagements. As is usual in such cases, the waivers were granted on the condition that Mr. Mandel conform to his stated itinerary and limit his activities to the stated purposes of his trip. On his 1968 visit, Mr. Mandel engaged in activities beyond the stated purposes of his trip. For this reason, a waiver of ineligibility was not sought in connection with his September 1969 visa application.

However, we learned subsequently that in 1962 and 1968 Mr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and in the interest of free expression of opinion and exchange of ideas, we recommended

a waiver for Mr. Mandel. The Immigration and Naturalization Service (acting for the Attorney General) responded that a waiver was not warranted.

Sincerely yours,

(S) M. J. Ortwein
M. J. ORTWEIN,
Chief, Domestic Services Division,
Visa Office.

EXHIBIT N

EMBASSY OF THE UNITED STATES OF AMERICA,
CONSULAR SECTION,
avenue des Arts 36,
1040 Bruxelles, le 1r. décembre 1969.

Monsieur ERNEST E. MANDEL,
rue Jos. Impens 127,
1030 Bruxelles.

MONSIEUR: Je me réfère à votre demande de visa pour les Etats-Unis et à la demande d'obtenir une dérogation en vertu du par. 212(d)(3)(a) aux causes d'inéligibilité d'admission trouvées dans votre cas.

Confirmant le message téléphonique qui vous a été remis samedi le 29 novembre dernier par Monsieur Elmendorf, je dois vous informer que la demande de dérogation a été refusée par les autorités à Washington D.C. Je regrette que cet avis ne vous ait pas été communiqué plus tôt, l'Ambassade n'ayant pas été avisée de ce refus avant samedi matin.

Veuillez agréer, Monsieur, l'assurance de ma considération distinguée.

(S) Alta Fowler
ALTA FOWLER,
Consul des Etats-Unis,
d'Amérique.

EXHIBIT O

...The speech Nixon &

Mitchell tried to ban

ERNEST

MANDEL

Revolutionary
Strategy
in the

Imperialist
Countries

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A MERIT PAMPHLET

INTRODUCTION

By George Novack

The speech printed in this pamphlet has a dramatic history. It was prepared by the noted Belgian Marxist scholar, Ernest Mandel, for delivery at an all-day conference held November 29, 1969, at Town Hall, New York City. The theme of the occasion, held under the auspices of the Bertrand Russell Peace Foundation and the Socialist Scholars Conference, was AGENCIES OF SOCIAL CHANGE; TOWARDS A REVOLUTIONARY STRATEGY FOR ADVANCED INDUSTRIAL COUNTRIES. The other participants included André Gorz of the French monthly *les Temps Modernes*, Professor James O'Connor of San Jose (California) State College; Art Fox of UAW Local 600 in Detroit; Paul Sweezy, co-editor of *Monthly Review*; Stanley Aronowitz, columnist for *The Guardian*; and Steve Zeluck, president of the New Rochelle, N.Y. Federation of Teachers.

Ernest Mandel could not give the speech in person as originally planned. The audience of 1,200 heard it through a tape recording. A trans-Atlantic telephone hookup had been planned so that Mandel could participate in the discussion, but the circuit failed.

He was prevented from visiting this country by a ruling of Nixon's Attorney General, John N. Mitchell, who refused to issue a waiver under the McCarran-Walter Act.

Here is the story behind this denial, which created a policy split in the highest circles of the Nixon administration and stirred a storm of controversy in the national and international press.

Mandel had been admitted to the United States in 1962 and 1968. The second time he spoke at thirty colleges and universities from coast to coast.

Nonetheless, the government refused to permit him to enter the country when he applied for a four-day visa to debate Harvard Professor John Kenneth Galbraith at Stanford University, October 18. In his keynote address to that conference Professor Galbraith declared: "It seems to me that the failure to give Ernest Mandel a visa is silly, stupid, irrational and also grievously bad politics. It angers everyone involved. It angers the Belgians. It angers the Americans and so far as I can see doesn't please anybody." He called upon the audience to write the State Department condemning "this stupid action."

In the following weeks the volume of protests mounted on a national scale. The *New York Times* editors declared on Oct. 28 that "the idiotic decision to bar Dr. Mandel must be reversed." Two Nobel Laureates, Salvador E. Luria of M.I.T. and George Wald of Harvard; a group of prominent intellectuals including Susan Sontag, Noam Chomsky, Professor Arno Mayer of Princeton, and Richard Poirier, an editor of *Partisan Review*; the Presidents of Stanford, Princeton and ~~W~~assau; and faculty members of more than fifty universities condemned the administration's ban on Mandel as a violation of academic freedom and a reversion to McCarthyism.

This campaign had its effect in Washington. Secretary of State William Rogers and Undersecretary Elliott L. Richardson ordered a reconsideration of the case, and then recommended that Mandel be given a visa. But he didn't get it.

The 1952 McCarran-Walter Act technically excludes certain categories of foreigners who belong to "proscribed organizations" on a secret list compiled by the Justice Department. Only the Attorney General has the statutory authority to grant exemptions from this ban. This was accorded Mandel under the Kennedy and Johnson administrations, which had largely permitted the exclusion part of the act to lapse.

Attorney General Mitchell, Nixon's campaign manager in 1968 and chief political adviser today, is of a different mind. He and Vice-President Agnew have initiated a campaign of intimidation designed to curb dissent and consolidate the Republican constituency in the Southern states and "Middle America." His decision to bar Mandel, an internationally known Trotsky-

ist, coincides with this course. When Mandel toured the United States in 1968, his revolutionary positions were assailed by such right-wing voices as Barron's *Business and Financial Weekly*, the conservative columnist William Buckley, and the Hearst press, whose editor-in-chief, William Randolph Hearst, Jr., wrote front-page editorials on Mandel. Mitchell and his entourage incline in the same reactionary direction.

This deliberate revival of the closed-door provisions of the McCarran Act has been interpreted as a reversion to McCarthyism by the *N.Y. Times*, the *N.Y. Post*, *Time*, *Newsweek*, the *Communist Daily World*, the *London Guardian* and numerous other commentators.

Under the title, "McCarranism Revisited," the Nov. 27 *N.Y. Times* stated: "The denial of the waiver that was necessary for issuance of a visa by the State Department assumes added significance because Secretary Rogers himself is known to have recommended approval of Dr. Mandel's visa. While the battle of the visa began at low levels of routine bureaucratic hurdles, it has culminated in a contest of conflicting authority and ideology at the highest stratum of the Administration. The plain fact is that the Justice Department, on Attorney General Mitchell's orders, overruled a request which the State Department considered in the national interest."

So far the Attorney General has rejected all appeals to change his stand. The Washington authorities subsequently hardened their attitude by preventing Tariq Ali, editor of *The Black Dwarf*, who is a leader of the British antiwar movement and also a well-known Trotskyist, from speaking at a convention of the Arab-American University Graduates and a Young Socialist Educational Conference at Detroit in early December.

The National Emergency Civil Liberties Committee, and its chief counsel, Leonard Boudin, who won a reversal in the Dr. Spock conspiracy case and a court appeal which assured Julian Bond his seat in the Georgia legislature, are studying legal steps to challenge the constitutionality of the provisions of the McCarran-Walter Act under which Ernest Mandel has been excluded.

Indeed, the Mandel case is far from closed.

Meanwhile Merit Publishers is issuing this pamphlet so that Americans may read what a man who is probably the most influential and authoritative exponent of Marxist ideas in the West today had to say, even though the President and Attorney

General barred the door against him. Mandel is best known for his two-volume work *Marrist Economic Theory*, which has been translated into many languages from German to Arabic. Among writings of his made available by Merit Publishers are the pamphlets *An Introduction to Marxist Economic Theory*, widely used in college courses, and the recently printed *The Marxist Theory of the State*.

Mandel's conception of revolutionary strategy for the advanced industrial countries stood out in sharp contrast with the more or less libertarian, semi-anarchist and purely spontaneist positions presented by several of the other participants in the Town Hall conference. As an orthodox Marxist of the Trotskyist school, he stressed the necessity of building revolutionary parties linked in an international organization in order to prepare the working class for the conquest of power and assure the triumph of the struggle for socialism.

According to *Newsweek* of Dec. 8, Secretary of State Rogers is said to have fumed to an aide, "Why should we be afraid of this man and his ideas?" Why, indeed? Read this speech and other of Mandel's writings. Attorney General Mitchell's fear of Mandel's revolutionary ideas may then become understandable, even though his action cannot be justified or condoned but must be fought.

DECEMBER 5, 1969.

REVOLUTIONARY STRATEGY IN THE IMPERIALIST COUNTRIES

By Ernest Mandel

Let me first say something about my exclusion. It demonstrates a lack of confidence on the part of the Nixon administration in the capacity of its supporters to combat Marxism on the battleground of ideas. I would not be carrying any high explosives, if I had come, but only, as I did before, my revolutionary views which are well known to the public.

Why should the Washington authorities be so afraid of my presenting them when many Marxist books are freely sold in the United States, including my own? In the nineteenth century the British ruling class, which was sure of itself, permitted Karl Marx to live as an exile in England for almost forty years. Times have certainly changed when the most powerful of

capitalist governments today refuses a brief visit to an exponent of his doctrines!

On the other hand the press outcry and the protests over this action show that public opinion in the United States is very much alert to the dangers that threaten our basic freedoms.

A revolutionary strategy is possible only in a revolutionary epoch: this is a basic tenet of Marxism. A social revolution cannot be achieved until objective historical conditions have placed that revolution on the agenda. A social revolution cannot result simply from the desires, dreams, ideals of revolutionary-minded individuals. Its consummation requires a level of socio-economic contradictions which makes the overthrow of the ruling class objectively possible. And it needs the presence of another social class which, as a result of its place in the process of production, its weight in society, and its political potential, can successfully achieve this overthrow.

A revolutionary strategy in the advanced industrial countries today only makes sense, from a Marxist point of view, if one affirmatively answers these two questions: Is there a historical structural crisis of the world capitalist system? Does the working class have a revolutionary potential?

All those who consider that world capitalism has been a system in full expansion for twenty-five years or longer and remains so, that, in other words, the historical epoch of ascending capitalism is not yet over, cannot reasonably project a revolutionary strategy as a short- or medium-range perspective. They can, in the best of cases, maintain a principled opposition to the capitalist system on grounds similar to that of Western social-democracy in its best period prior to World War I through a combination of the struggle for immediate reforms with general socialist propaganda. That's what the few reformists who call themselves Marxist in Europe—in the USA they seem to have disappeared—actually do.

There are also those who claim to be Marxists but assume that capitalism has gone through a period of tremendous worldwide expansion—Russia being capitalist, China being capitalist, and capitalism solving in one country after another the problem of socio-economic underdevelopment. They, too, can remain consistent with their theoretical assumptions only by acting like reformists, i.e., by excluding any need for a revolutionary strategy as an immediate perspective in the West.

Revolutionary Marxists, on the other hand, have to prove that they are living in a historical epoch of crisis and disintegration of the world capitalist system, if they want to keep their search for a revolutionary strategy on the foundations of historical materialism. Evidence in that field is rather overwhelming. After all, nobody really believes that Presidents Johnson and Nixon have sent over a half a million soldiers to Vietnam to prevent Ho Chi Minh from spreading capitalism to South Vietnam. What they want to stop is not capitalist competition by their competitors—who could seriously argue that the main economic competition which U.S. imperialism meets today on a world scale comes from North Vietnam or China, or even the Soviet Union at that!—but a challenge by an opposing social system, a challenge from anti-imperialist and anti-capitalist forces on a world scale. This challenge, which has existed ever since the October Revolution, is bigger today than it ever was, having spread to all six continents. Nothing of the kind existed in that epoch of expanding and triumphant capitalism which lasted through the nineteenth century up to World War I.

It is sometimes alleged that the growth of the productive forces in Western imperialist countries since World War II—which is undeniable—disproves the existence of a historical crisis of decline and decomposition of world capitalism. This argument is not very convincing. It reflects a mechanistic conception of how a certain mode of production, how a certain set of relations of production, become fetters on a further development of the productive forces. A historical analogy will immediately clarify the point. Could one really argue that there was an absolute decline of the productive forces, say, in France during the fifty or twenty years prior to the Great French Revolution of 1789? Or, to take an even more striking example: Was the Russian Revolution of 1917 preceded by twenty years of stagnation and decline, or rather by twenty years of stormy expansion of the productive forces?

In his famous Preface to *A Contribution to a Critique of Political Economy*, written in January 1859, Marx specifies the necessary and sufficient preconditions for a historical epoch of social revolution in the most concise way possible: "At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same

thing—with the property relations within which they have been at work before. From forms of development of the forces of production, these relations turn into their fetters. Then begins an epoch of social revolution."

The keystone of Marx's materialist theory of social revolution is therefore the concept of the *contradiction* between production and property relations on the one hand and the productive forces on the other hand. In today's world this conflict expresses itself in three ways. First, by the inability of world capitalism to solve any basic economic problems of the masses within the framework of the imperialist system. This is most graphically demonstrated by its inability to eliminate centuries-old backwardness in the so-called third-world countries. Second, by the growing inability of the system to contain the growth of productive forces—especially of the science-oriented third industrial revolution—within the framework of private property and the nation-state. Third, by a periodic large-scale revolt of masses of industrial and intellectual workers, as well as of youth in general, against the persistence of these capitalist relations of production, which mutilate their needs, their lives and their capacity for self-realization, and totally thwart the tremendous potential of human freedom and human self-realization opened up by contemporary industry, technology, and science.

Marx's famous prediction of a hundred years ago, that the productive forces would transform themselves more and more into destructive forces if they were not in time liberated from the fetters of private property and profit orientation, hits the nail squarely on the head. This does not imply an absolute decline in production but a much more frightful form of decay: a qualitative transformation of the results of increased output which threatens to destroy the last remnants of freedom of choice for the individual, the material biosphere of mankind, if not the very existence of the human race. The output of an ever-increasing mass of increasingly meaningless commodities of increasingly doubtful quality; the pollution of the atmosphere, land and water; and the threat of nuclear and biological warfare resulting from the growth of tremendous permanent war expenditures all testify to the realism of Marx's prediction.

If we approach the problem in this way, we will likewise have a key to judge the revolutionary potential of the working class. This is not primarily a question of gauging what workers

think—going around with an electronic counter, measuring the number of workers reading capitalist or reformist newspapers and those reading revolutionary ones; comparing the affiliations to trade unions led by labor lieutenants of capitalism or to reformist working-class parties with those of the number of working-class members and sympathizers of revolutionary organizations, and then reaching the obvious conclusion that the overwhelming majority of the Western working class is not yet under the political influence or leadership of revolutionists. This is essentially a problem of analyzing the workers' force in reality and what they *do*, of ascertaining what the objective significance of their actions is.

In order to prove that the working class has lost its revolutionary potential, it would be necessary to prove that all the periodic explosions of working-class discontent—whose reality nobody can deny—are centered exclusively around problems of higher wages and shorter working hours, to enable them to have more time to consume capitalist commodities and enjoy the services of the capitalist leisure industries. But this image does not correspond to the reality of Western European workers' discontent; it does not correspond to the reality of the discontent of Japanese and Australian workers; it does not correspond to the reality of discontent in such an industrialized country of Latin America as Argentina; nor will it correspond to the future explosions of discontent in the United States since the politically advanced countries simply show the politically more backward one the image of its own future.

Any analysis of the May 1968 revolutionary upsurge in France cannot but arrive at the conclusion that its main thrust, on behalf of the working class, went far beyond questions of higher wages and shorter working hours. And since May 1968, we have had an uninterrupted series of examples reflecting this main thrust in all the main industrial countries of Western Europe: Italy, Britain, and even that supposed bulwark of conservatism and social conformism, Western Germany.

When workers challenge the basic organization of labor at plant level as they have done in many Italian factories (in one case, that of the Candy washing machine plant, even raising the problem of eliminating the basic division of labor between manual workers and white-collar employees by a job-rotation system); when they challenge the employers' right to lay off workers, close factories, or transfer equipment to other factories,

as they are starting to do in Britain; when they raise at plant level the slogan of "Open the Books" in response to employers' refusal to grant demands, as they did during several recent wild-cat strikes in Western Germany; when they seize and occupy a factory in answer to an employer's lockout, as they recently did at the Le Mans Renault plant in France, they thereby express their instinctive urge to raise the level of class struggle and of class confrontation from the elementary union level of the redistribution of income between profits and wages to the highest level prior to the struggle for power. This is the level of challenging Capital's right to dispose as it wills of workers and machines.

Such is the basic trend of the new working-class initiatives in Western Europe today. It is a clear challenge to the continuance of capitalist relations of production. This provides a striking illustration of the revolutionary potential of the working class. And this is why a revolutionary strategy in the Marxist sense of the word is both possible and indispensable, if the new upsurge of working class militancy which is now in full swing in Europe is not to end in defeat as it did in the previous three main periods of upsurge: that at the end of World War I; that during the mid-thirties; and that at the end of World War II.

To state that an analysis of the working class as an agency of social change should start from how the workers act and not from what they think does not at all imply that the question of their thinking—of their level of consciousness—is irrelevant to the processes of social change in the West. On the contrary: it is a basic thesis of Marxism that a socialist revolution, at least in an advanced industrial country, needs a high level of consciousness of the working class to be successful.

Socialism is the first social system in the history of mankind to be introduced by the conscious action of its collective creators and not, so to speak, behind the backs of the actors in history's drama. But once we understand that, in the last analysis, it is not consciousness which determines social existence, but social existence which determines social consciousness, it is in the realm of the conditions of production, of contradictions between human needs and capitalist relations of production, and of the inner contradictions of that capitalist mode of production itself that we have to discover the reasons for the dialectical development of working-class consciousness in its successive phases.

Under normal conditions, the ruling ideology of society and the ruling pattern of behavior of worker cannot but be determined by the ideology, the values and patterns created and promoted by the ruling class. Then, under conditions of growing social crisis, a growing part of that same working class cannot but liberate itself progressively from that same ideology and pattern of behavior inspired by the ruling class.

Marcuse's main mistake is the assumption that, because the capitalist class can undoubtedly largely shape the consumer behavior and ideas of a majority of workers, it can thereby erase the acute awareness of alienation in the field of production. Alienation of the consumer and of the citizen is allegedly an efficient and sufficient means to suppress awareness of being alienated as producer. But this flies in the face of historical experience, of theoretical analysis, and simple common sense. After all, what a man does during his work; the frustrations he undergoes eight to ten hours a day—when one also counts the time spent going to and from the place of work—cannot but periodically influence his behavior at least as much, and very likely more than, the manipulated "satisfactions" he can "enjoy" four hours a day and during weekends.

It is true that a whole series of conjunctural factors is required to bring this reflection of the structural ills of capitalism to the threshold of the workers' consciousness. Conjunctural shifts in the trends of income and employment (a slight decrease of real wages after a long period of increases; a sudden increase in unemployment after a long period of full employment; a sudden threat of technological unemployment and mass layoffs in some key sector of industry, etc.); a crisis of leadership in the ruling class; a deep-going political crisis as a result of foreign imperialist adventures; a sudden upsurge of militancy and anti-capitalist activity in "marginal" sectors of society, like the students or the teachers: all these factors and many others can create a favorable climate for a growing awareness by the workers of their alienation as producers, and for a sudden shift of the class struggle to questioning the employer's authority in the shops, factories, and offices themselves. We are unlikely ever to find two large countries where an identical combination of circumstances will produce the general result we have described.

It is also true that purely spontaneous struggles challenging Capital's right and power to command men and machines cannot go beyond a certain level. We are here confronted with one of the most complicated problems of Marxism and of sociology or contemporary history in general: the interaction between the spontaneous struggles of the workers, the rôle of the vanguard organizations, and the growth of working-class consciousness.

As a revolutionary Marxist, I do not believe that you can abolish an army or militarism by shortening guns millimeter by millimeter. Capitalism is a structure which can absorb and integrate many reforms (e.g., wage increases) and which automatically rejects all those reforms which run counter to the logic of the system (such as completely free public services which completely cover social needs). You can abolish the structure only by overthrowing it, not by reforming it out of existence.

But the understanding of the objectives of that revolutionary process, which can only take the form of social ownership of all the means of production and of conquering political power for the mass of the toiling people, must go hand in hand with an understanding of the dialectical unity between the struggle for reforms and the diffusion of revolutionary consciousness. Without the practical experience and partial victories acquired by the workers in their struggle for immediate demands—both economic and political ones—a rise of consciousness in the working class, a rise in its self-confidence, is impossible. And without such a rising self-confidence, the revolutionary insolence involved in challenging the rule of the most powerful, richest and best-armed ruling class which has ever existed on earth—the Western bourgeoisie—is just not imaginable.

The credibility of any plan for taking power, what Lenin called a revolutionary strategy, would in such cases be very low indeed in the eyes of broader masses. Gradual, molecular, nearly invisible processes of accumulating self-confidence, consciousness of the potential power of one's own class, are therefore of the utmost importance in preparing class explosions like May 1968 in France and the one which is now being prepared in Italy.

Objective contradictions in the system make periodic explosions of working-class discontent inevitable. But let me remind you of Lenin's statement that what distinguished a true revolutionist from a reformist was the fact that the former kept

on spreading revolutionary propaganda even though the period was not—or not yet—revolutionary or prerevolutionary. Multiple skirmishes, together with continuous socialist revolutionary propaganda, prepare the working class for entering these explosions with a growing awareness of the need to challenge the system as a whole, of the need for a general struggle, a general strike, a challenge against the political as well as the social and economic power of the ruling class.

But this awareness in turn is not in itself sufficient. It does not guide the working class to the next immediate step forward, once it has engaged in a general struggle. It does not answer the question: What do we do when we have occupied the factories? It is lack of consciousness of this decisive next step forward which again and again has stopped the working class in its tracks. This happened in the first years after World War I in Germany; in 1920 and 1948 in Italy; in 1936 and 1968 in France.

Two answers can be given to that question. The first one insists on the key rôle played by the building of a revolutionary party, which centralizes experience, consciousness, and assures its continuity. I shall come back to this question in a minute. It is obviously an essential part of the answer, but it is not the only one. Without a certain level of working-class consciousness and revolutionary self-activity, a revolutionary party cannot transform a struggle for immediate demands into a struggle challenging the very existence of the capitalist system. Even more so, without such a consciousness in at least part of the working class, such a revolutionary party cannot really become a mass party.

This is today the heart of the problem of revolutionary strategy in the Western industrialized countries. As I do not believe that capitalism will suddenly collapse as a result of its inner contradictions; as I do not believe that the main task of revolutionary socialists is just to sit on the sidelines and interpret current events, hopping for some miracle to bring about a revolution; as I firmly believe in the virtue of conscious intervention, in the key pedagogic rôle of struggle and experience drawn from struggle for the working class, my conclusion is the following: only by trying to expand actual living working-class struggles toward an incipient challenge against the authority of the employers, of the capitalist system, and of the bourgeois state inside the factories (and incidentally also in the neighborhoods, the living quarters of the working class) can a qualita-

tive rise in working-class consciousness be achieved. This gives struggles for workers' control today in imperialist countries key strategic importance.

Through such struggles, and only through such struggles, can the workers achieve the understanding that what the overthrow of capitalism is all about in the last analysis, is, to use Marx's famous formula, for the associated producers to take over the factories and the whole industrial system and run it for the common benefit of mankind, instead of having it run for accumulating profit and capital for a few giant financial groupings locked in deadly competition with each other. Through such struggles, and only through such struggles, can the workers build the actual organs through which they can, tomorrow, themselves take over the administration of the economy and the state: freely elected workers' committees at shop level, which will federate themselves afterwards locally, regionally, and internationally. That's what the conquest of power by the working class really means.

It is highly significant that one of the main demands born from the present upsurge in militancy of the Italian working class is the demand for free election of shop stewards at all levels of plant organization, including each conveyor belt, and the conception of these *delegati di reparto* as people who constantly challenge the chiefs, bosses, and foremen, the whole hierarchy which presses down on the worker in the capitalist plant. It is significant because in some giant factories, like the FIAT plant in Turin with 80,000 workers, the workers have already started to implement this demand even before they have conquered the "legal" right to do so. This is a historical step forward compared to the May 1968 revolt in France where, through an inability to set up organs of self-representation of this type, the workers were unable to prevent the Communist Party and union bureaucracy from reabsorbing their powerful upsurge through a combination of wage increases and new parliamentary elections.

A strategy of workers' control—a strategy of transitional demands, as they were called by the Communist International during its first year of existence, and later by Leon Trotsky and by the Fourth International—has, of course, many pitfalls. Any attempt by the workers to actually run a few factories isolated from the rest of the economy is doomed to failure, because they'll have to enter into competition with capitalist firms and submit to the inexorable imperatives of that competition. From this situation flow all the famous "laws of

motion" of capitalism—as producers' cooperatives have found out again and again to their sorrow. But revolutionary socialists, while understanding all these pitfalls and dangers, will not be inhibited by them to the point of abstaining from attempts to broaden the class struggle through these challenges to capitalist authority. There is no other way to develop anti-capitalist consciousness among hundreds of thousands and millions of workers than along this road. Propaganda through the written, or spoken word can convince individuals by the hundred and, in the best of cases, by the thousands. Millions will be convinced only by action. And only by actions for transitional demands, for workers' control of production, which is the transitional demand *par excellence* in our epoch, will these millions see their understanding and consciousness rise to the level necessary for a revolutionary change in Western society.

To initiate, broaden, and generalize these experiences, you need a revolutionary vanguard organization. Without such an organization, isolated experiences or initiatives of groups of vanguard workers will remain just that: isolated experiences. The role of the centralization of consciousness, of generalization of experience, of continuous transmission of knowledge, as against the inevitably discontinuous character of mass struggles, can be played only by such a vanguard organization. Just as imperialism is a world system and the multinational corporation the most typical organizational unit of Capital today, so labor needs an international organization to realize that most difficult and most exalting of tasks: to derive a maximum of revolutionary understanding and consciousness from a maximum of worldwide revolutionary activity.

Individuals who adhere to a revolutionary vanguard organization can be motivated in the most variegated ways; they can come from very different social backgrounds. The impact which two decades of revolutionary upsurge of the peoples of Asia, Latin America, and Africa has had on the revival of revolutionary consciousness in the West has been incommensurably more important than the actual economic damage it has done to the functioning of the capitalist world system up to now. The impact which the revolutionary student movement, and revolutionary youth movement in general, has had upon a reawakening of the working class in Western Europe and Japan cannot be overestimated. Even in Western Germany, in the first wave of large-scale wildcat strikes for nearly forty years, one found thousands of essentially still unpolitical and unsocialist

steelworkers in Dortmund imitating in their large demonstrations all the new forms of struggle introduced in Western German society by the revolutionary student movement during the previous two years.

But only if there exists a political leadership which can coordinate all these various forms of emergent revolutionary consciousness and direct them toward a central goal—the overthrow of capitalism; the conquest of political power—can the full momentum of the upsurge be maintained and the reawakened working class fully deploy its revolutionary potential. This of course includes a tremendous potential of spontaneous initiative. Actions by students and scientists; rent strikes and movements for women's liberation; revolts against disintegrating public services and uninhabitable cities; the taking over of hospitals and factories; all these multiple manifestations of revolt by all the creative layers of society against the capitalist relations of production, against oppression and exploitation in all their forms, can come into their own and avoid being co-opted by bourgeois society or ending in defeat only if they lead to a decisive showdown with the bourgeois class. In the last analysis, all these movements are political, because they pose the question of which class exercises power in society as a whole and in the state, and not merely the question: Who commands the machines in *one* plant? Who is to dictate the organization of *one* university? Who is to determine where *one* park should be located? Who is to run the buses in *one* city and in whose interest?

The unique unity of spontaneous mass revolt and mass organization in the full flowering of workers' democracy, on the one hand; and the concentrated consciousness, the distilled lessons of four centuries of modern revolutions and a hundred and fifty years of working-class struggles which is represented by a revolutionary party, on the other hand: this dialectical unity is embodied in the system of workers' councils which is the key answer to all the contemporary problems of mankind. For this system is a unique combination of free expression with dissent and unity of action, of liberty and efficiency, of individual self-expression and freely accepted collective solidarity. In such a system you can have, as you had in Russia in the first year of the revolution, ten, fifteen political tendencies coexisting and contending with one another for political hegemony, but at the same time bound together by a common concern to preserve and develop the revolution and fight against the common

enemy. The inklings of a similar system became visible in the summer days of 1936 in Spain, when the workers with nearly naked hands broke the onslaught of the fascist army in practically every important industrial city of the country.

The inklings of a similar system are slowly emerging today in the revolutionary upsurge which has been maturing in Western Europe since May 1968 in France. It is history's answer to the central question of our epoch, whether freedom and democracy can flourish and coincide with the tremendous objective surge towards the national and international centralization of power initiated by contemporary technology. My answer is, yes, it can, in a system of democratically centralized and planned self-management of workers and toiling people. This conclusion brings us back to the starting point. What are the agencies of social change in the West today? It is the basic thrust of the productive forces themselves, undermining, eroding, and shaking periodically in a violent way private property, the nation-state, and generalized market economy. It is the inevitable periodic explosions of labor's discontent against its alienation as producer, against the capitalist relations of production at plant level, locally, regionally, or nationally. It is the re-emergence of revolutionary consciousness in the youth through the transmission belts of the colonial revolution, the student revolt, the rise of a new generation of revolutionary teachers, scientists, technicians, and intellectuals. It is the potential fusion of that revolutionary consciousness with large masses of workers through campaigns and actions for transitional demands, culminating in workers' control of production. And it is the building of the revolutionary party and the revolutionary International. The better we succeed in combining all these elements, the closer we shall be to a socialist world and to the emancipation of labor and of all mankind!

EXHIBIT P

January 30, 1970.

Hon. JOHN N. MITCHELL,
Attorney General,
Department of Justice,
Washington, D.C.

Re Ernest Mandel.

DEAR MR. MITCHELL: I refer you to our prior correspondence with respect to my client, Mr. Ernest Mandel, and particularly

to my letters of December 2 and December 15, 1969, which have not been answered.

I now write on behalf of Mr. Mandel and the members of the academic community who previously sponsored or supported his visit to the United States and on behalf of those and other members of the academic community who are still interested in having the application for a visa granted. In this connection I write specifically on behalf of Professor Robert Paul Wolff of the Department of Philosophy at Columbia University, Professor Noam Chomsky of the Department of Linguistics at M.I.T., Professor Richard Falk of the Center for International Studies at Princeton University, Dr. Robert Heilbroner of the Department of Economics at the New School for Social Research, Professor Wassily Leontief of the Department of Economics at Harvard University, and Professor Norman Birnbaum of the Department of Sociology at Amherst College. On their behalf, I again request that you advise me as to the reasons for your refusal to accept the Secretary of State's recommendation that a visa be granted.

I am specifically authorized by Mr. Mandel and by the persons named to indicate to you that the members of the academic community continue to desire Mr. Mandel's admission, and that Mr. Mandel continues to request of you both an explanation of the action previously taken by you, as well as favorable action by you upon his application for a visa.

You will appreciate the fact that neither Mr. Mandel nor any of the persons desiring his admission to participate in public meetings, are in a position to schedule such meetings in the absence of your taking action to grant a visa in accordance with the Secretary of State's recommendations. They do not again wish to be put in a position of having made arrangements for public meetings which had to be cancelled at the last moment, because it was only then that you reached your decision not to accept the Secretary of State's recommendation.

In the event that you should continue, for reasons which are at the moment not clear to me, to fail to respond to this letter, I shall have to construe it as a continuing denial of your refusal to grant a visa in accordance with the recommendation of the Secretary of State.

I am sending a copy of this letter to the Secretary of State.

Sincerely yours,

LBB: rm

LEONARD B. BOUDIN.

EXHIBIT Q

[Refer to This File No. CO 212.23-C]

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
Washington, D.C. 20536. February 13, 1970.

Mr. LEONARD B. BOUDIN,
RABINOWITZ, BOUDIN & STANDARD,
Attorneys at Law,
30 East 42nd Street,
New York, New York 10017.

DEAR MR. BOUDIN: I have your letters of December 2 and 15, 1969 and January 30, 1970 concerning Ernest Mandel.

An alien who desires to make a temporary visit to the United States must first obtain a nonimmigrant visa from an American Consul abroad. If the alien is found inadmissible, the Consul may not issue him a visa. In such a case, the Secretary of State may, under certain circumstances, make a recommendation to the Attorney General that the alien be temporarily admitted to the United States notwithstanding his inadmissibility. If the Service, in behalf of the Attorney General, approves the recommendation, the Department of State is so advised and the Consul may then issue the alien the nonimmigrant visa. No provision is made in such a case for an alien to make application to this Service or to the Attorney General for the exercise of this discretionary authority.

The consular officer has found that Mr. Mandel was ineligible for a visa because of his subversive affiliations. However, as you are aware, Mr. Mandel's entry was previously authorized twice as a result of the Department of State's recommendation, notwithstanding his ineligibility for admission to the United States.

On his last visit in 1968, Mr. Mandel's entry was authorized for a series of academic engagements in the United States. His activities, while here, were much reported to the press and went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country.

[see p. 71 for conclusion of letter]

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(N'ÉCRIREZ PAS DANS L'ESPACE CI-DESSUS. RÉSERVE AU SERVICE.)

1. NOM DE FAMILLE		PRENOM USUEL		AUTRES PRENOMS	
<u>M. 1618</u>		<u>PCG</u>		<u>PCG</u>	
2. AUTRE(S) NOM(S) (Y COMPRIS LE NOM DE JEUNE FILLE, PSEUDONYME, ETC.)			3. NATIONALITÉ		
			<u>Américain</u>		
4. LIEU DE NAISSANCE (Ville, Département, Pays)			5. DATE DE NAISSANCE (Jour, Mois, Année)		
<u>France, 1618, Alsace</u>			<u>5. 1. 1923</u>		
6. DOMICILE			7. TELEPHONE		
<u>M. 1618, 127 rue Joss</u>			<u>75. 25. 43</u>		
8. ADRESSE COMMERCIALE			9. TELEPHONE		
10. PROFESSION			11. SEXE		
<u>Indépendant</u>			<u>M. 1618</u>		
12. CHEVEUX (Couleur)	13. YEUX (Couleur)	14. TAILLE	15. TÊTE (Clair, Coloré, etc.)		
<u>Châtain</u>	<u>Grains</u>	<u>1m 71</u>	<u>Clair</u>		
16. SIGNES PARTICULIERS (Cicatrices visibles, etc.)					
17. SITUATION DE FAMILLE					
<input checked="" type="checkbox"/> Marié(e) <input type="checkbox"/> Célibataire <input type="checkbox"/> Veuf(ve) <input type="checkbox"/> Divorcé(e)					
18. BUT DU VOYAGE AUX ETATS-UNIS (Tourisme, affaires, visite à la famille ou à des amis, etc.)					
<u>Conférences dans les Universités américaines</u>					
19. DURÉE DU SEJOUR ENVISAGÉ AUX ETATS-UNIS			20. DATE APPROXIMATIVE DU DÉPART POUR LES ETATS-UNIS		
<u>2 mois</u>			<u>4 septembre 1968</u>		
21. QUI COUVRIRA VOS FRAIS DE TRANSPORT ET DE SEJOUR? (Vous-même, votre société, votre frère aux Etats-Unis, etc.)					
<u>Américains</u>					
22. VOTRE CONJOINT SE TROUVE-T-IL AUX ETATS-UNIS?			23. VOTRE PERE OU VOTRE MERE EST-IL (ELLE) AUX ETATS-UNIS?		
<input type="checkbox"/> Oui <input checked="" type="checkbox"/> Non			<input type="checkbox"/> Oui <input checked="" type="checkbox"/> Non		

24. INDIQUEZ OU ET APPROXIMATIVEMENT QUAND VOUS AVEZ DEMANDE POUR LA DERNIERE FOIS UN VISA POUR LES ETATS-UNIS

25. PRECISEZ

☐ Visa accordé

☐ Visa refusé

☐ Demande abandonnée

26. N'AVEZ-VOUS JAMAIS DEMANDE UN VISA D'IMMIGRATION POUR LES ETATS-UNIS ?

☐ Oui

☐ Non

27. DEPUIS COMBIEN DE TEMPS VIVEZ-VOUS DANS LE PAYS OU VOUS FAITES VOTRE DEMANDE ?

28. ENUMEREZ LES PAYS, AUTRES QUE CELUI DANS LEQUEL VOUS FAITES VOTRE DEMANDE, DANS LESQUELS VOUS AVEZ VECU PENDANT PLUS D'UN AN AU COURS DES CINQ DERNIERES ANNEES ET LES DATES APPROXIMATIVES DE CES RESIDENCES

Pays

Dates Approximatives

Algérie

29. A QUELLE ADRESSE DESIREZ-VOUS QUE VOTRE VISA ET VOTRE PASSEPORT SOIENT ENVOYES ?

30. AVIS IMPORTANT: La législation des Etats-Unis interdit la délivrance d'un visa de visiteur à toute personne qui a l'intention de s'établir dans le pays d'une façon permanente ou pour une période illimitée. Toute personne admise aux Etats-Unis avec un visa temporaire ne peut que s'y livrer aux activités pour lesquelles ce visa a été délivré. Un visiteur ne peut travailler. La législation des Etats-Unis interdit la délivrance de tout visa à toute personne atteinte d'une maladie contagieuse dangereuse, telle que la tuberculose; qui a souffert d'une maladie mentale sérieuse; qui est toxicomane ou se livre au trafic des stupéfiants; qui a des antécédents judiciaires y compris tout délit envers la morale publique; ou qui est ou a été membre de parti communiste ou de toute organisation affiliée, à moins que ces motifs d'exclusion n'aient fait préalablement l'objet d'une dispense spéciale. Au cas où l'une des restrictions énumérées ci-dessus s'appliquerait à vous, il est suggéré que vous vous présentiez dans nos bureaux pour une entrevue personnelle. Si cela n'est pas possible dès maintenant, une déclaration détaillant les faits vous concernant devrait être jointe à votre demande et nous être adressée. Dans certains cas il est possible d'obtenir une dispense des restrictions prévues. Des renseignements sur ce point, et sur toute autre question ou matière de visas, peuvent être obtenus en téléphonant, en vous présentant, ou en écrivant à nos services.

31. AVEZ-VOUS LU ET COMPRENEZ-VOUS BIEN LES INDICATIONS DONNEES AU PARAGRAPHE 30 DE CETTE FORMULE ?

☒ Oui

☐ Non

32. L'UNE QUELCONQUE DES RESTRICTIONS ENUMEREES AU PARAGRAPHE 30 S'APPLIQUE-T-ELLE A VOUS ?

☐ Oui

☒ Non

LE CAS ECHEANT, DONNEZ TOUS DETAILS SUR UNE FEUILLE JOINTE

33. Un visa accordé à toute personne ayant, en pleine connaissance de cause, donné de faux renseignements dans sa demande de visa est susceptible d'être annulé soit avant d'être arrivé aux Etats-Unis. Toute personne ayant fourni de tels faux renseignements est inapte à l'avance à recevoir un visa.

34. Je certifie que les réponses que j'ai données sur cette formule sont exactes pour autant que je sache. De plus, je reconnais que la possession d'un visa n'assure pas au titulaire l'entrée aux Etats-Unis et, lors de son arrivée ou port d'entrée, il est établi que le titulaire ne peut être admis.

23/7/1968

Date

Ernest Moudi

Signature

(N'ECRIVEZ PAS DANS CET ESPACE RESERVE AU SERVICE)

[This is conclusion of letter appearing at p. 68]
 Accordingly, when the recent recommendation was made that he be permitted to enter for a third time, it was concluded that the favorable exercise of discretionary authority provided under the Immigration and Nationality Act was not warranted and his temporary admission was not authorized. There is no basis for changing this determination.

Sincerely,

(S) JAMES F. GREENE,

(S) James F. Greene

Associate Commissioner, Operations.

EXHIBIT R

DEPARTMENT OF STATE DIVISION OF LANGUAGE SERVICES.

[TRANSLATION]

Is No. 16988, T-120/R-XXXII, French.

1. Name: Ernest Esra Mandel.
2. Other names used, etc.: [Blank].
3. Nationality: Belgian.
4. Place of Birth: Frankfurt, German.
5. Date of Birth: April 5, 1923.
6. Address: 127 rue Josse Impeus, Brussels 3.
7. Telephone: 16 95 43.
8. Business Address: [Blank].
9. Telephone: [Blank].
10. Occupation: Journalist.
11. Sex: Male.
12. Color of Hair: Dark Brown.
13. Color of Eyes: Dark Brown.
14. Height: 1 m, 81 cm.
15. Complexion: Fair.
16. Distinguishing marks: [Blank].
17. Martial Status: Married.
18. Purpose of trip to the United States: Lectures at American universities (see enclosed letters) and tourism.
19. Length of proposed stay in the United States: 2 months.
20. Approximate departure date for the United States: September 4, 1968.

21. Who will cover your transportation and travel expenses?
The universities.

22. Is your wife in the United States: No.

23. Is either your father or your mother in the United States?: No.

24. State where and approximately when you last applied for a United States visa: March 1962.

25. Mark correct box: [Visa granted].

26. Have you ever applied for a United States immigrant visa?: No.

27. How long have you lived in the country where you are applying?: 44 years.

28. List countries, other than the one in which you are making your application, where you have lived for over one year during the last five years, and your approximate dates of residence therein: None.

29. Where do you want your visa and passport to be sent?:
127 rue Josse Impens, Brussels 3.

30. [Notice.]

31. Have you read and understood the contents of paragraph 30 above? Yes.

32. Do any of the restrictions of paragraph 30 apply to you?: No.

33. [Notice.]

34. Date: July 23, 1968 [Signed] Ernest Mandel.
ERNEST MANDEL,
127, Rue Jos, Impens,
Bruxelles 3,
Tel. 16.95.43.

BRUXELLES, LE

Socialist Scholars Conference, Rutgers University, September 6 to 8.

McGill University/Montreal, September 16.

University of Toronto, Political Economy Dept., September 18.

Western University, Cleveland (not yet confirmed), September 19.

University of Pittsburgh, Economics Dept., September 20.

University of Michigan, September 21.

Western Michigan University, Kalamazoo, September 23.

University of Indiana, September 24.

DéPaul University, Economic Dept., Chicago, September 26.

University of Wisconsin, Political Science Dept., September 27.

Minneapolis, Carleton College, September 28.

University of California, Riverside, Los Angeles, October 3.

University Los Angeles State, History Dept. (not yet confirmed), October 1.

University of California, Berkeley, Economics Dept., October 4.

University of California, Berkeley, Slavic Studies, October 6.

San Francisco State University, Dept. of History, October 7.

University of Washington, Seattle, October 9.

Simon Fraser University, Vancouver, October 10.

University of Vancouver, October 11.

University of Pennsylvania, Philadelphia, October 14.

State University of New York, Binghamton, Economics, October 15.

State University of New York, Binghamton, Russian Studies, October 16.

Swarthmore College, Pennsylvania, Economics Dept., October 20.

Between Oct. 21 and Oct. 29; Universities at Boston and New Haven, not yet confirmed.

Hofstra College, Hempstead, L.I., October 30.

Itinerary:

Arrival New York, Wednesday, September 4.

Rutgers, September 6 to September 8.

New York area, September 9 to September 14.

Montreal (Canada), September 15-16.

Toronto (Canada), September 17-18.

Cleveland, September 19.

Pittsburgh, September 20.

Detroit-Michigan area, September 21-23.

Bloomington, Ind., September 24.

Chicago, September 25-26.

Madison, September 27.

Minneapolis, September 28.

Travel, September 29.

Los Angeles area, September 30 to October 3.

San Francisco Bay area, October 4-7.

Travel, October 8.

Vancouver (Canada), October 10-11.

Travel, October 12.

East Coast (Philadelphia, Boston, Binghamton, New Haven, New York City, pending final arrangements),
October 13 to November 1.

SOCIALIST SCHOLARS CONFERENCE,

P.O. BOX 412, COOPER STATION,

New York, N.Y., June 9, 1968.

TO THE MEMBERS AND FRIENDS OF THE SSC:

Enclosed you will find a preliminary program for the Fourth Annual Socialist Scholars Conference. The Conference is scheduled for Friday, Saturday and Sunday, September 6, 7, and 8, 1968. It will be held on the campus of Rutgers University in New Brunswick, New Jersey. Rutgers is 50 minutes by bus from the Port Authority Terminal at 41st Street and 8th Avenue, in New York City. It may also be reached by train from the Pennsylvania Station at 33rd St. and 7th Avenue, or by automobile via the New Jersey Turnpike to exit 9. It is possible to charter buses from New York to New Brunswick and return. If such a plan would suit your needs, please indicate so in the registration form below. Overnight accommodations in New Brunswick are very limited.

In some respects, the program represents a departure from the past. On the basis of suggestions and criticisms from many sources, the Steering Committee decided that the previous format (numerous and very large panels on a great variety of subjects with little opportunity for discussion) was ineffective in realizing the primary purpose of our organization. This purpose has always been to deepen our knowledge and scholarship through critical confrontation of generally sympathetic but professionally demanding scholars.

This year the program will have a unifying theme, "The Socialist Perspective in the Advanced Countries." There will be no more than six panels (as compared to 18 in 1967), and each will be devoted to a significant problem within the general theme. Following the session, all participants (panelists and audience) will meet in discussion groups of 20 to 30 people where the issues raised during the presentation may be debated more adequately than previous procedures had permitted.

This new format demands more preparation, both from the panelists and the audience. The former will be expected to prepare their papers well before the Conference so that abstracts

of each paper will be available to all participants by September 6. For its part, the audience must also do its homework. True enough, many in our previous audiences were as knowledgeable or more so than the panelists themselves. On the other hand, some listeners have lacked sufficient background either to learn from the papers or contribute to the discussion.

In the hope of making this Conference a greater success, the Steering Committee requests all who will be present to do some reading before hand. When you return the registration form, please indicate which sessions you plan to attend. On or about July 15, a short list of book-titles for those sessions will be sent to you. (If you wish, you may have bibliographies for all the sessions, but it would still be useful for us to know which panels you expect to attend.)

Fraternally,

(S) John M. Cammett
JOHN M. CAMMETT,
President, 1967-68,
Socialist Scholars Conference.

Registration form: Tear off and mail with payment before July 15, 1968

Name _____

Address _____

Affiliation _____

Registration _____ \$10.00

Students _____ 5.00

Dinner 9/6 _____ 5.00

Contribution _____

(tax deductible!)

Total \$ _____

Make checks payable to:

Socialist Scholars Conference,

Box 412, Cooper Station,

New York, N.Y. 10003

Panels I expect to attend:

_____ Susman

_____ Gutman

_____ Mandel

_____ Williams

_____ Cruise

_____ Weinstein

_____ please check if interested
bus service.

Notice: On October 18, 1968, the SSC will present the following program at Town Hall in N.Y.C.:

"On Frantz Fanon: Two Critiques and a Discussion." Chairman: Conor Cruise O'Brien. Critiques by Eugene Genovese and A. Norman Klein. Comments by Conrad Lynn and Vincent Harding.

FOURTH ANNUAL SOCIALIST SCHOLARS CONFERENCE

"The Socialist Perspective in the Advanced Countries"

Rutgers University, New Brunswick, N. J.

September 6, 7, 8, 1968

PRELIMINARY PROGRAM

Friday, September 6

10:00 a.m. Opening Remarks.

10:30 a.m. THE ROLE OF INTELLECTUALS IN SOCIAL CHANGE: Warren Susman (Rutgers U.). Chairman: Conor Cruise O'Brien (N.Y.U.). Commentator: Christopher Lasch (Northwestern U.).

10:30 a.m. NEW THOUGHTS ON THE HISTORIOGRAPHY OF THE AMERICAN WORKING CLASS: Herbert Gutman (U. of Rochester). Chairman: Melvyn Dubofsky (U. of Mass.). Commentators: Philip Foner (Lincoln U.), Stephen Thernstrom (Brandeis U.).

12:30 p.m. Lunch.

2:30 p.m. Discussion of morning panels.

6:00 p.m. Dinner.

7:30 p.m. Guest speaker (Possible speakers: André Gorz, Raymond William, Eric Hobsbawm, E. P. Thompson).

Saturday, September 7

10:00 a.m. THE WORKING CLASS AND NEO-CAPITALISM: Ernest Mandel (editor of the Belgian socialist weekly, *La Gauche*, and author of the two-volume *Traité d'Economie marxiste*). Commentators: Louis Salkeever (State U. of N.Y., Albany), Alexander Erlich (Columbia U.).

10:00 a.m. DECENTRALIZATION AND AMERICAN SOCIALISM: William Appleman Williams (U. of Wisconsin). Commentators: James Becker (N.Y.U.), Leo Huberman (*Monthly Review*).

12:00 noon: Lunch.

1:30 p.m. BLACK POWER AND SOCIALISM: A DISCUSSION OF HAROLD CRUSE'S *The Crisis of the Negro Intellectual*: Eugene Genovese (Sir George Williams U.) and Sterling Stuckey (Northwestern U.). Chairman: Alphonse Pinckney. Commentator: Harold Cruse.

3:30-5:30 p.m. Discussion of morning and afternoon panels.
9:00 p.m. Party in New York City.

Sunday, September 8

10:00 a.m. THE PRECONDITIONS FOR A MASS SOCIALIST PARTY IN THE UNITED STATES: James Weinstein (author of *The Decline of Socialism in America, 1912-1925*). Chairman: Ann Lane (Douglass College). Commentators: Gar Alperovitz (M.I.T.), Michael Greenberg (Brooklyn Poly.), Geoff White (Berkeley).

12:00 noon: Lunch.

1:30 p.m. Discussion of morning panel.

3:45 p.m. Business Meeting of the SSC.

Note: A leading Soviet sociologist has also been invited to participate in the work of the Conference. Other scholars from Eastern Europe have been informed of our program and invited to attend.

UNIVERSITY OF PENNSYLVANIA,
WHARTON SCHOOL OF FINANCE AND COMMERCE,
Philadelphia, Pa. 19104, June 7, 1968.

DEPARTMENT OF ECONOMICS

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011.

DEAR MR. NOVACK: We would be interested in having Mr. Ernest Mandel address our Seminar on Economic Planning during the fall semester. A good day for us would be on October 29, or another Tuesday in that approximate period.

Sincerely yours,

(S) Richard A. Easterlin,
RICHARD A. EASTERLIN,
Chairman, Department of Economics,

RAE: fb

FACULTY OF ARTS AND SCIENCES,
UNIVERSITY OF PITTSBURGH,
Pittsburgh, Pa. 15213, June 4, 1968.

DEPARTMENT OF ECONOMICS

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011.

DEAR MR. NOVACK: We should like to have Mr. Ernest Mandel talk to our Economics Department Seminar while he is here. Would it be possible for him to come either September 20 or 27? The Seminar meets Friday afternoons from 3:15 to about 5:00.

I wonder if he would be willing to talk to us about Contemporary Marxism in Europe, East and West.

We follow the custom of having two graduate students act as discussants for the seminar paper. We aim at having the seminar paper in their hands a couple of weeks before the seminar. It is also helpful to have extra copies for distribution.

The Department offers an honorarium of \$100 and travel expenses up to \$100.

Sincerely yours,

(S) Janet G. Chapman
JANET G. CHAPMAN,
Professor of Economics.

JGC/lhz

STATE UNIVERSITY OF NEW YORK AT BINGHAMTON,
Binghamton, N.Y. 13901, May 30, 1968.

DIVISION OF SOCIAL SCIENCES

DEPARTMENT OF ECONOMICS

Mr. ERNEST MANDEL,
c/o NOVACK,
326 West 19th Street,
New York, N.Y. 10011.

DEAR MR. MANDEL: I understand from George Novack that you are planning a lecture tour in the United States during the coming September and October.

If you are available October 3rd-4th, I would like to invite you to our campus for lectures to our sociology department.

Russian studies department, and possibly the economics department. If these dates are unsuitable, please let me know, and I will try to coordinate our plans with yours.

I look forward to hearing from you at your earliest convenience.

Sincerely yours,

(S) Melvin M. Leiman
MELVIN M. LEIMAN,

Associate Professor of Economics.

UNIVERSITY OF CALIFORNIA, RIVERSIDE,
Riverside, Calif. 92501, May 29, 1968.

DEPARTMENT OF ECONOMICS

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011.

DEAR MR. NOVACK: The Department of Economics at the University of California, Riverside would be very happy to have a Lecture here by Mr. Ernest Mendel somewhere between October 4 and November 4. We will pay him an honorarium.

We have some questions, however, which we would appreciate some answers to first. First, we would like to know what the cost would be. We have only a limited amount of funds for this purpose, since Governor Reagan has cut out a good portion of our budget. Therefore, please let us know what the minimum amount would be.

Secondly, we would like to suggest that perhaps he could make up the difference to a larger amount by getting another invitation somewhere on the West Coast. The only suggestion I personally can think of would be to have him speak at Berkeley, where it would probably be a good idea to contact Professor Reginald Zelnick, of the History Department there.

I would think we could have him speak on "The Marxist Theory of Alienation." That would be our preferred topic, and I take it that would be alright with him. Please let me know as soon as possible what the possibilities are (both as to costs and dates).

Yours,

(S) Howard Sherman
HOWARD J. SHERMAN,

Professor

HJS/cf

SWARTHMORE COLLEGE,
Swarthmore, Pa. 19081, May 29, 1968.

DEPARTMENT OF ECONOMICS

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011.

DEAR MR. NOVACK: I apologize for my delay in answering your letter of April 28 concerning Ernest Mandel's visit to this country next fall.

We would be very pleased to have Mr. Mandel come to Swarthmore to talk on whatever aspect of contemporary Marxian economic thought is of most interest to him. His lecture topic, "Marxist Economics and Contemporary Capitalism" should give him all the scope he may need. We also hope that he could meet informally with a group of seminar students interested in the general area of international politics, either before or after his lecture.

We don't have any fixed dates, but as possibilities let me mention October 17 or 24 (both Thursdays), or October 13 or 20 (both Sundays). If those are not possible, I am sure other dates could be arranged.

We normally give an honorarium of \$100 for such a lecture, plus travel expenses, but if he were able to come for a longer period, we of course would adjust the stipend accordingly.

Thank you for bringing this possibility to our attention, and I do hope a mutually satisfactory date can be worked out.

Sincerely yours,

(S) Frank C. Pierson

FRANK C. PIERSON,

Chairman.

FCP/g

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif. 94720, May 21, 1968.

DEPARTMENT OF ECONOMICS

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011

DEAR MR. NOVACK: This is in response to your letter of April 28, regarding Ernest Mandel's visit to the U.S. next fall. The Department of Economics and the Center for Slavic and East European Studies here would be interested in sponsoring two talks by Mr. Mandel, preferably on the following two topics, which were among the four you listed: (1) Marxist economics and contemporary capitalism; (2) problems of the Soviet economy. Following our standard practice, we would be prepared to offer Mr. Mandel an honorarium of \$75 for each lecture (i.e. \$150 for both). Unfortunately, we are not in a position to make any further contribution to Mr. Mandel's expenses.

We would be delighted if you are able to fit such a visit to Berkeley into Mr. Mandel's schedule, and we look forward to hearing from you at your convenience.

Sincerely,

(S) Roy Radner
~~ROY RADNER,~~
Chairman.

RR/cl

P.S. The first day of instruction in the Fall Quarter is September 30. Since the first week of instruction is usually rather hectic, it would be desirable if Mr. Mandel's talks were not scheduled before October 7.

WESTERN MICHIGAN UNIVERSITY,
Kalamazoo, Mich. 49001, May 8, 1968.

SCHOOL OF GENERAL STUDIES
SOCIAL SCIENCE AREA

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011

DEAR MR. NOVACK: Your letter to Dr. Fredy Perlman of April 20, 1968, has been forwarded to me for reply. Dr. Perlman is presently in Italy where he is lecturing in an Institute which has also seen fit to invite Ernest Mandel as a guest lecturer. I have learned that they have made contact with each other and that they are enjoying this chance/opportunity to meet face to face.

Since Dr. Perlman will not be back in Kalamazoo until the end of the summer, I think it would be useful for you to send me the further details which deal with Mr. Mandel's American visit.

Sincerely yours,

(S) David S. De Shon
DAVID S. DE SHON,
Chairman.

DSD:sko

HOFSTRA UNIVERSITY,

COLLEGE OF LIBERAL ARTS AND SCIENCES

Chicago 14, Ill., May 6, 1968.

Mr. GEORGE NOVACK,
326 West 19th Street,
New York, N.Y. 10011

DEAR MR. NOVACK: Thank you and Paul Sweezy for the opportunity to present Ernest Mandel to our students. We are definitely interested in arranging one or two lectures on our campus in the topics offered. I believe that this could be done during the Fall Quarter, which begins in September.

Please let us know when Mr. Mandel would be coming through Chicago and also about the financial arrangements, fees, etc. While we are operating under a very modest budget, we are, of course able to pay something reasonable provided

that we would not have to pay all the expenses of his travel and stay in Chicago. Please let us hear from you at your earliest convenience.

Sincerely,

JOSEPH GIGANTI,
*Chairman, Speakers Committee,
Behavioral Social Science Division.*

HOFSTRA UNIVERSITY,
Hempstead, Long Island, N.Y. 11550, April 29, 1968.

DEPARTMENT OF ECONOMICS

Mr. ERNEST MANDEL,
*c/o George Novack,
326 West 19th Street,
New York, N.Y. 10011*

DEAR SIR: The Economics Club of Hofstra University offers its members and others the opportunity to hear teachers and experts from outside the university and to discuss with them topics that have particular relevance to the present economic situation.

We would like to take this opportunity to invite you to address the Economics Club on the subject "Problems of Transitional Economies or the Marxist Theory of Alienation". We have chosen the tentative date of Wednesday, October 30th, 1968 at 3:30 p.m.

Our meetings usually last about one hour and a half during which time the speaker gives an informal talk for about forty minutes followed by a question and answer period over coffee and cake.

If you would like to accept our invitation but find the date inconvenient, we would be glad to rearrange our schedule for any other week-day at the same time. We hope that you will be able to accept our invitation since it offers us the opportunity to hear a viewpoint which has failed to gain sufficient exposure in this country.

Looking forward to seeing you on the 30th, I am

Cordially yours,

(S) Myron Jackler
MYRON JACKLER,
Secretary,

Economics Club, Hofstra University.

[Filed in Clerk's Office, U.S. District Court E.D. N.Y.]

[Caption Omitted]

Designation of Judges

70-C-344

Having been notified by the Honorable John R. Bartels United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable John R. Bartels, to hear and determine said cause as provided by law: Honorable Wilfred Feinberg, United States Circuit Judge, and Honorable John F. Dooling, Jr., United States District Judge for the Eastern District of New York.

IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the United States District Court for the Eastern District of New York.

(S) J. EDWARD LUMBARD,

*Chief Judge, United States Court
of Appeals for the Second Circuit.*

Dated: New York, N.Y., June 16, 1970.

[Caption Omitted]

Answer

Civil Action No. 70-C-344

Defendants, answering the complaint herein by their attorney, Edward R. Neaher, United States Attorney for the Eastern District of New York, respectfully show to the Court and allege:

1. The allegations of paragraph 1 of the complaint present questions of law which are referred to the Court for determination.

2. Deny knowledge or information sufficient to form a belief as to each and every allegation of paragraphs of the complaint marked 2, 3, 6, 10, 14, 16 and 17.

3. Deny each and every allegation of paragraph 15 of the complaint except admit that on December 1, 1969 Mandel was advised by letter that a waiver of ineligibility was refused in his case.

4. Deny each and every allegation of paragraphs 4, 18, 19, 20 and 21.

*As and for a First Complete, Separate and Affirmative Defense
As to Plaintiff Mandel*

5. The plaintiff Mandel is not a citizen of the United States and lacks standing to assert the Constitutional rights of a citizen of the United States.

As and for a Second Complete, Separate and Affirmative Defense

6. The plaintiffs Mermelstein, Leontiff, Birnbaum, Heilbroner, Wolff, Menashe, Chomsky and Falk lack standing to sue for an immigration visa for the plaintiff Mandel.

As and for a Third Complete, Separate and Affirmative Defense

7. The Court lacks jurisdiction over the subject matter of this action.

As and for a Fourth Complete, Separate and Affirmative Defense

8. The complaint fails to state a claim upon which relief can be granted.

As and for a Fifth Complete, Separate and Affirmative Defense

9. 8 U.S.C. § 1182(a)(28) and its subsections which are the subject of this action constitute a valid exercise by Congress of a right of the United States of America as a sovereign, independent nation.

WHEREFORE, defendants demand judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated: Brooklyn, N.Y., July 8, 1970.

EDWARD R. NEAHER,

United States Attorney, Eastern District of New
York, Attorney for Defendants, 225 Cadman
Plaza East, Brooklyn, N.Y. 11201.

By: LLOYD H. BAKER,
Assistant United States Attorney.

To: Rabinowitz, Boudin & Standard, Esqs., Attorneys for Plaintiffs; 30 East 42d Street, New York, N.Y. 10017.

[Caption Omitted]

STATE OF NEW YORK
County of Kings, ss:

Affidavit
70-C-344

LLOYD H. BAKER, being duly sworn, deposes and says:
I am an Assistant United States Attorney duly appointed and acting according to law and am in charge of this case and familiar therewith. I make this affidavit in opposition to plaintiffs' motion for the convening of a three-judge court and for an injunction.

Although the Department of Justice has not as yet been supplied with the State Department file in this matter, a reading of plaintiffs' motion papers clearly shows that Ernest Mandel, whose application for a nonimmigrant visa is at issue in this case, is an advocate of the "economic, international and governmental doctrines of world communism" and thus is an alien who is ineligible to receive a visa under the terms of 8 U.S.C. § 1182(a)(28)(D).

In fact, his attorney describes him in the complaint (para. 6a) as "an internationally noted Marxian scholar and economist and the author of *Marxist Economic Theory* (1969)."

Plaintiffs' attorney, Mr. Leonard B. Boudin, in his affidavit in support of this motion (para. 3) again states "Mr. Mandel is an internationally noted Marxist scholar . . . He is the editor-in-chief of the Belgian Left Socialist weekly *La Gauche*. He is also the the author of several books * * *" and again refers to the above-mentioned (*Marxist Economic Theory* (1969)). The title of his proposed speech at one of the stops on his proposed speaking tour which is in issue herein was "Revolutionary Strategy in the Imperialist Countries" (page 3 of Mr. Boudin's affidavit; Exhibit O).

In an introduction to a printed copy of the above-mentioned speech which Ernest Mandel had planned to make in New York City (Exhibit O), Mr. Mandel is described as "an internationally known Trotskyist". "When Mandel toured the United States in 1968, his revolutionary positions were assailed by such right wing voices as * * *" (page 4 of the introduction to Exhibit O). See also page 5 where he is called "a man who is

probably the most influential and authoritative exponent of Marxist ideas in the West today." Further in the same paragraph "Mandel is best known for his two volume work *Marxist Economic Theory*" and reference is also made to two other of his works, *An Introduction to Marxist Economic Theory* and *The Marxist Theory of the State*.

Thus, there appears to be no issue of fact as to whether Ernest Mandel is an alien who advocates the doctrines of world communism, so as to be within the purview of 8 U.S.C. § 1182 (a)(28)(D), and also that he comes within the purview of subsection (G)(v), as being an alien who writes and publishes matter advocating and teaching the doctrines of world communism. The only issue then is the question of the constitutionality of those sections raised by the plaintiffs.

Mr. Boudin makes reference in his affidavit to Mr. Mandel's statements in his applications for visas that he is not a member of any Communist Party. However, since Mr. Mandel is an excludable alien under the terms of the above-cited sections, this is irrelevant. The statute excludes not only members of the Communist Party (which is covered by a different subsection) but, as set forth above, those who advocate communism, and those who write and publish matter advocating communism.

The power and authority of the United States, and of Congress, to prohibit and regulate immigration, and to exclude aliens altogether, has been upheld again and again, and is inherent in sovereignty and essential to self-preservation. Previous court decisions throughout the years make this principle firmly established beyond doubt. Legal precedents will be cited in our memorandum of law. Therefore, whether or not Mr. Mandel violated the previous conditions of waiver in 1962 and/or 1968 is irrelevant. (Mr. Boudin attempts to raise this issue at pp. 7-8 of his affidavit.) Mr. Mandel clearly comes within a class of aliens which Congress has excluded by statute, and Congress clearly has the absolute power to exclude aliens whom it wishes to exclude, and can delegate the power to grant a waiver of that exclusion to the executive branch. To grant a waiver or not is merely a matter of grace.

Promises and assurances as to future conduct and compliance with the terms of waiver (raised at page 8 of Mr. Boudin's affidavit) are likewise irrelevant.

The Attorney General is not required to justify his finding that the applicant should not receive a waiver. The power of the sovereign United States of America to exclude aliens is absolute, and the granting of a waiver of that exclusion is merely a matter of grace, as stated above. Therefore, the official to whom Congress has delegated the power to grant a waiver is not required by law to get into a disputed question of fact with the applicant, which Mr. Boudin is apparently trying to promote (page 11 of his affidavit). The Attorney General is not required to provide an explanation for his finding and decision. Likewise, a hearing is not required (page 13 of Mr. Boudin's affidavit). Nor is the substantial evidence rule applicable in the case of an application for a visa (page 14 of Mr. Boudin's affidavit). Granting or withholding a waiver is a matter of discretion to be exercised by the Attorney General after receiving a recommendation from the State Department. There is of course nothing in the statute which says that the Attorney General must follow the recommendation of the State Department.

In view of the well established law on the subject which is contrary to the plaintiffs' contentions, it is urged that the convening of a three-judge court is not warranted. Also, it is evident that plaintiffs do not have a clear prospect of being successful in this action, which would justify the granting of an injunction.

WHEREFORE, I respectfully request that this motion be denied in all respects, both as to the convening of a three-judge court, and the granting of an injunction.

Sworn to before me this 9th day of June 1970.

CYRIL HYMAN,

Notary Public, State of New York,

No. illegible,

Qualified in Nassau County, Commission Expires March 30, 1971.

[Caption Omitted]

Decision of United States District Court, Eastern District of New York * * * See appendix to jurisdictional statement.

70 Civ. 344

Order

The above captioned cause having been duly referred to this statutory Court pursuant to an order of Hon. J. Edward Lumbard, Chief Judge of the United States Court of Appeals, Second Circuit, and said cause having duly come on to be heard before us on June 24, 1970, and upon filing the opinion of this Court dated March 18, 1971, it is

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for a preliminary injunction and declaratory judgment is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants are hereby enjoined and restrained from implementing and enforcing §§ 212(a)(28) and 212(d)(3)(A) of the Immigration & Nationality Act of 1952, 8 U.S.C. § 1182a(28) and (d)(3)(A) so as to deny plaintiff Mandel admission to the United States as a non-immigrant visitor, and it is further

ORDERED, ADJUDGED AND DECREED that the above specified sections of the Immigration & Nationality Act of 1952 are invalid and void insofar as they have been or may be invoked by the defendants to find plaintiff Mandel ineligible for a non-immigrant visa and to deny him temporary admission into the United States, and it is further

ORDERED, ADJUDGED AND DECREED that upon proper application by the plaintiff Mandel for a non-immigrant visa and for admission to the United States for purposes similar to those involved in his prior applications, which were the subject matter of this action, the defendants are directed to issue him a non-immigrant visa and to permit his admission into the United States, and it is further

ORDERED, that the effectiveness of the second decretal paragraph hereof is stayed for twenty days from the date hereof.

Dated: New York, N.Y., April 13, 1971.

(S) WILFRED FEINBERG,

U.S.C.J. 9

JOHN F. DOOLING, JR.,

U.S.D.J.

U.S.D.J.

[Caption Omitted]

Notice of Appeal

70 C 344

PLEASE TAKE NOTICE that the defendants hereby appeal to the Supreme Court of the United States from the order of the three-judge court herein dated April 13, 1971, and from each and every part of said order.

Dated: Brooklyn, New York, May 3, 1971.

EDWARD R. NEAHER,

*United States Attorney, Eastern District of New York,
Attorney for Defendants, 225 Cadman Plaza
East, Brooklyn, New York 11201.*

By: Lloyd H. Baker

LLOYD H. BAKER,

Assistant United States Attorney.

To: Clerk, United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201.

Rabinowitz, Boudin & Standard, Esqs., Attorneys for Plaintiffs, 30 East 42 Street, New York, New York 10017.

[Filed in the Clerk's Office, U.S. District Court E.D. N.Y.]

Notice of Motion

70 C 344

PLEASE TAKE NOTICE that upon the annexed affidavit of Lloyd H. Baker, sworn to May 3, 1971, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move the three-judge court convened in this case at a term to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on May 7, 1971 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order staying the operation of the order of this court dated April 13, 1971, and for such other and further relief as this court may seem just and proper in the premises.

Dated: Brooklyn, N.Y., May 3, 1971.

EDWARD R. NEAHER,

*United States Attorney, Eastern District of New York,
Attorney for Defendants, 225 Cadman Plaza
East, Brooklyn, New York 11201.*

By: Lloyd H. Baker

LLOYD H. BAKER,

Assistant United States Attorney.

To: Rabinowitz, Boudin & Standard, Esqs., Attorneys for
Plaintiffs, 30 East 42d Street, New York, New York 10017.

STATE OF NEW YORK } ss.: *Affidavit*
County of Kings, } 70-C-344

Lloyd H. Baker, being duly sworn, deposes and says:

I am an Assistant United States Attorney in charge of this case, and I am familiar therewith. I make this affidavit in support of this motion for a stay pending appeal to the Supreme Court.

By decision dated March 18, 1971, this Court, by a 2 to 1 decision, held unconstitutional certain subsections of the Immigration and Nationality Act of 1952 and directed that a temporary travel visa be issued to the plaintiff Mandel. An order thereon was signed on April 13, 1971.

We have been advised by the Department of Justice that the Solicitor General has directed that an appeal be taken to the Supreme Court.

Plaintiff Mandel had applied for a temporary visa for the purpose of making a lecture tour to American universities. If the order is not stayed, and Mandel applies for, and is issued a non-immigrant visa and completes his lecture tour, it is evident that the matter will become moot, and the purpose of taking an appeal to the Supreme Court will be frustrated. This case involves serious constitutional questions concerning the separation of powers of the branches of the government and the powers of the legislative and executive branches to control, restrict and regulate immigration and foreign visitors. The Solicitor General has determined that these questions should be determined by the Supreme Court, a direct appeal to the Supreme Court being provided by statute in cases of this nature.

WHEREFORE, I respectfully request that this motion be granted, and that the order of this court dated April 13, 1971 be stayed pending appeal to the Supreme Court.

(S) Lloyd H. Baker,
LLOYD H. BAKER,
Assistant United States Attorney.

Sworn to before me this 3d day of May 1971

(S) Paul E. Warburgh, Jr.,
 PAUL E. WARBURGH, Jr.,
 Notary Public, State of New York
 No. 52-9528430

Qualified in Suffolk County. Commission expires March 30, 1972.

AFFIDAVIT OF MAILING—(OMITTED)

AFFIDAVIT OF PERSONAL SERVICES—(OMITTED)

ORDER
 Civil Action No. 7-C-344

Upon the motion of defendants, dated May 3, 1971, for a further stay of the order of this court, dated April 13, 1971, in the above-entitled case, the affidavit in support thereof, sworn to May 3, 1971, and the affidavit in opposition, sworn to May 6, 1971, and the Notice of Appeal having been filed on May 3, 1971, it is hereby ordered that:

1. A stay of the order is granted for 30 days from the date hereof.

2. If during the 30-day period defendants file their jurisdictional statement on appeal from said order with the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

WILFRED FEINBERG,
 United States Circuit Judge.
 JOHN R. BARTELS,
 United States District Judge.
 JOHN F. DOOLING,
 United States District Judge.

Dated: May 11, 1971.

Order

70-C-344

On motion of defendants—appellants, plaintiffs opposing, it is

ORDERED, that the time within which the appellants may file this jurisdictional statement as a condition for continuance of the stay granted by the order of May 11, 1971, is extended to and including July 3, 1971.

Dated: Brooklyn, N.Y., June 10, 1971.

(S) WILFRED FEINBERG,
U.S.C.J.

(S) JOHN R. BARTELS,
U.S.D.J.

(S) JOHN F. DOOLING, Jr.,
U.S.D.J.

In the Supreme Court of the United States

OCTOBER TERM, 19—

No. 71-16

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED
STATES ET AL., APPELLANTS,

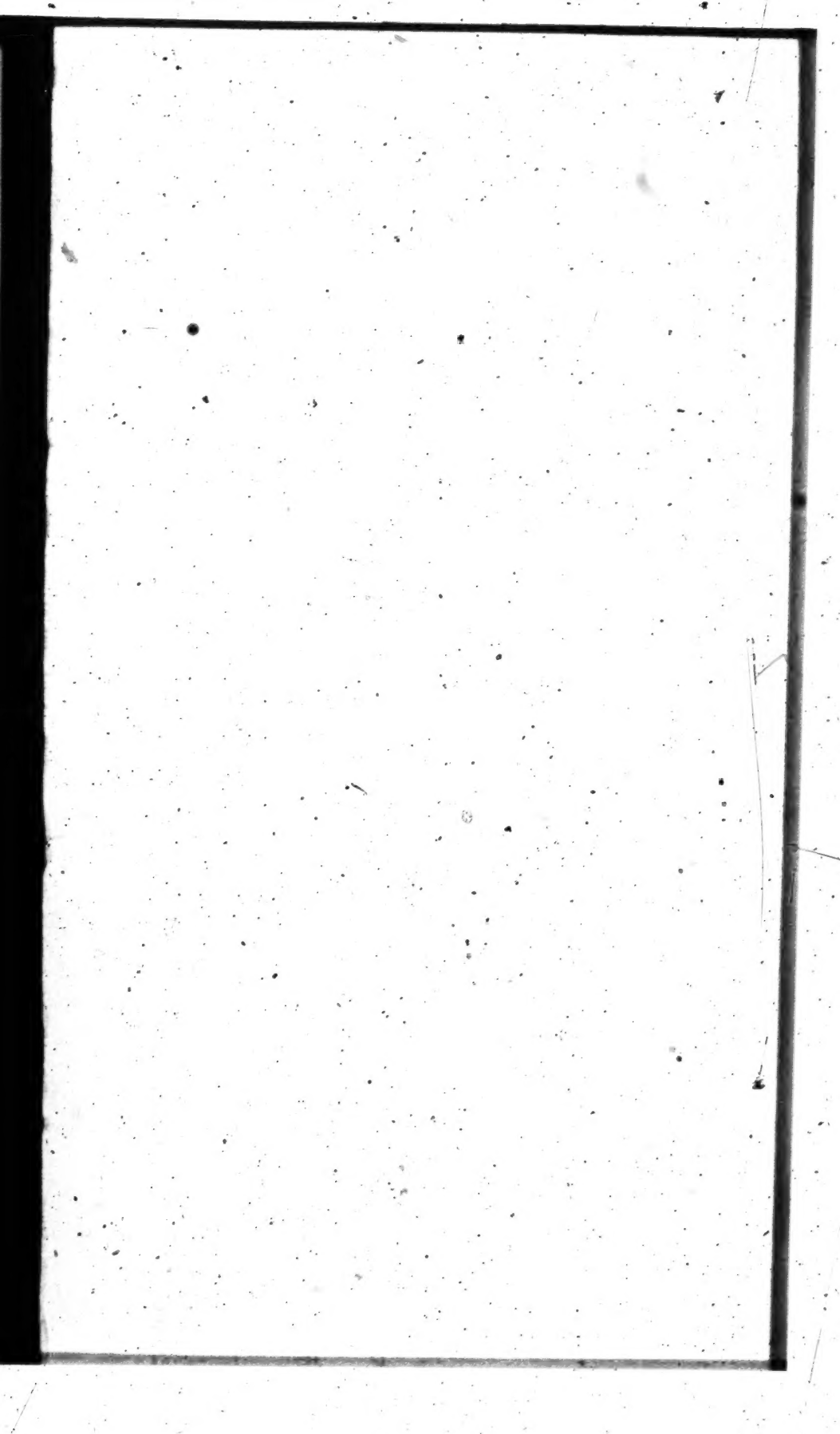
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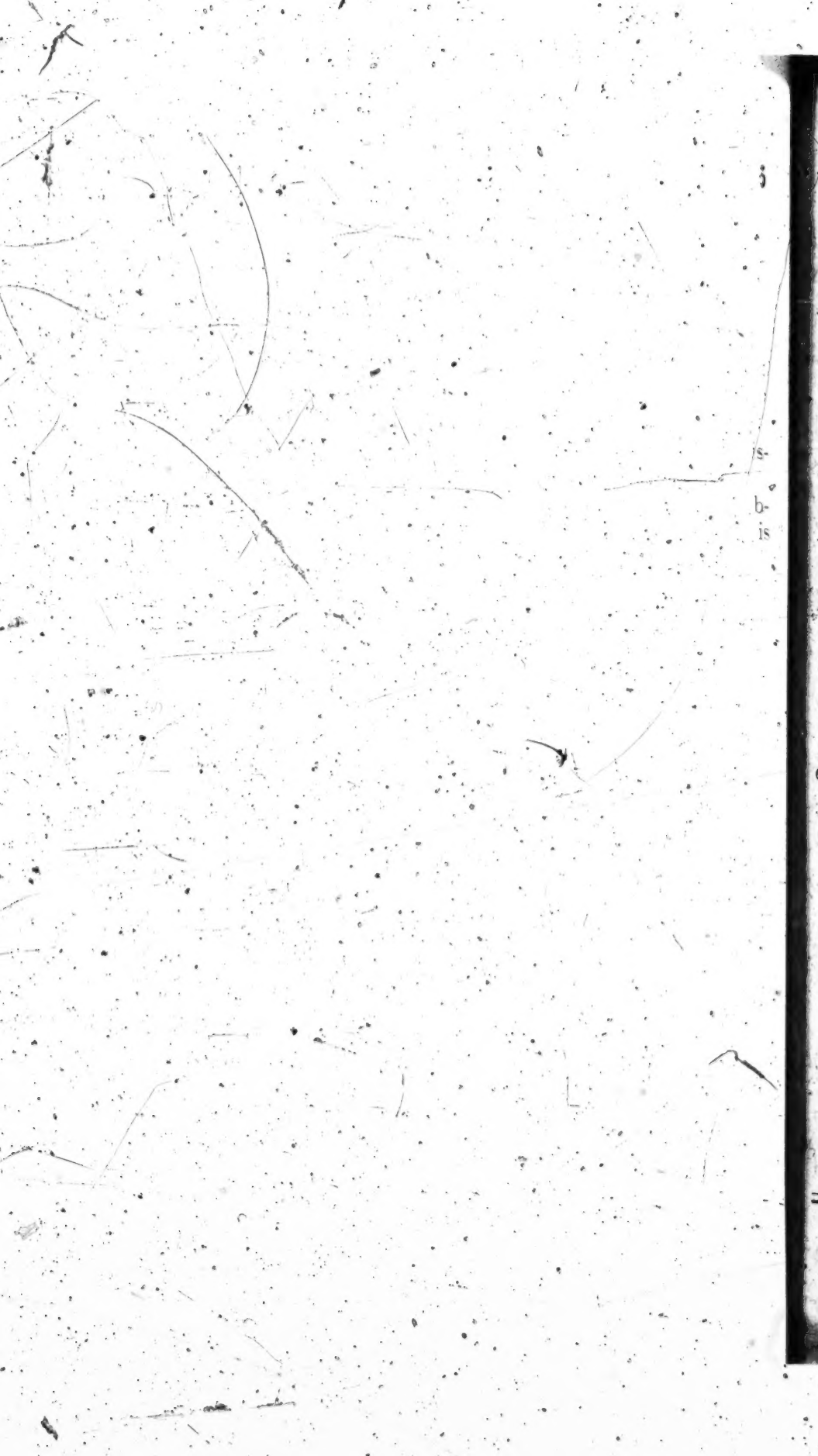
ERNEST MANDEL ET AL.

APPEAL from the United States District for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 10, 1972.





FILE COPY

Supreme Court U.S.

FILED

JUL 2 1971

No. 71 - 16

E. ROBERT SEAYER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE
UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY
OF STATE, APPELLANTS

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIFF,
NORMAN BIRNBAUM, ROBERT L. HEILBRONER,
ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY,
AND RICHARD A. FALK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD,
Solicitor General,

ROBERT C. MARDIAN,
Assistant Attorney General,

ROBERT L. KEUCH,
LEE B. ANDERSON,

*Attorneys,
Department of Justice,
Washington, D.C. 20530.*

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
The Questions Are Substantial	7
Conclusion	10
Appendix	1
District Court Opinion	1
District Court Order of April 13, 1971	60
Notice of Appeal	62

CITATIONS

Cases:

<i>Boutilier v. Immigration and Naturalization Service</i> , 387 U.S. 118	8
<i>Galvan v. Press</i> , 347 U.S. 522	8
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580	8
<i>Lamont v. Postmaster General</i> , 381 U.S. 301	9
<i>Nishimura Ekiu v. United States</i> , 142 U.S. 651	8
<i>The Chinese Exclusion Case</i> , 130 U.S. 581	8
<i>United States ex rel. Knauff v. Shaughnessy</i> , 338 U.S. 537	9
<i>United States ex rel. Turner v. Williams</i> , 194 U.S. 279	9
<i>Zemel v. Rusk</i> , 381 U.S. 1	9-10

Constitution and statutes:

United States Constitution, First Amendment	6, 7, 8-9
Immigration and Nationality Act of 1952, Section 212(a)(28) (D) and (G) and Section 212(d)(3)(a) ...	2
8 U.S.C. 1182(a)(28)	2, 4, 6, 7, 9
8 U.S.C. 1182(a)(28)(D)	2, 4
8 U.S.C. 1182(a)(28)(G)	3, 4
8 U.S.C. 1182(d)(3)(A)	3, 5, 7
28 U.S.C. 1252	2
28 U.S.C. 1253	2
28 U.S.C. 2282	6

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. —

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE
UNITED STATES, WILLIAM P. ROGERS, SECRETARY OF
STATE, APPELLANTS

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEON-
TIFF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER,
ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM
CHOMSKY, and RICHARD A. FALK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court and the opinion of the dissenting judge (App., *infra*, pp. 1a-59a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. 60a) was entered on April 13, 1971. The notice of appeal (App. 62a) was filed on May 3, 1971. On May 11, 1971, the district court granted a stay of its

judgment until June 10, 1971, and on June 10, 1971, granted a further stay until July 3, 1971. The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Sections 212(a)(28)(D) and (G)(v) and Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v), 1182(d)(3)(A), which provide that certain aliens shall be excluded from entry into the United States unless the Attorney General, in his discretion, waives inadmissibility, unconstitutionally deprive American citizens, who wish to hear an alien excluded under those provisions, of their right to free speech under the First Amendment.

STATUTES INVOLVED

8 U.S.C. 1182(a)(28), provides in pertinent part:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * * * *

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship * * *

* * * * *

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching * * * (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship.

8 U.S.C. 1182(d)(3)(A), provides in pertinent part:

(d)(3) Except as provided in this subsection, an alien (A) who is applying for a non-immigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) * * * may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General * * *

* * * * *

STATEMENT

The facts of this case are not in dispute. Appellee Mandel is a citizen and resident of Belgium. Although not a member of the Communist Party, he is an avowed Marxist, the editor-in-chief of the Belgian

Left Socialist Weekly, *La Gauche*, the author of a two-volume work entitled *Marxist Economic Theory*, published in 1969, and an advocate of the economic, international and governmental doctrines of world communism (App. 3a-4a). In 1969, after a number of universities and other institutions in the United States had invited him to lecture and participate in conferences, he applied to the American consul in Brussels, Belgium, for a nonimmigrant visa to enter the United States (App. 5a-6a). The other appellees in this case are United States citizens who had invited Mandel to speak, or who were to participate in programs with Mandel, or who wish to have Mandel visit their university or group (App. 7a).

Mandel's initial application for a visa was refused, and he was so notified by the American consul in Brussels on October 30, 1969 (App. 6a). The consul's letter informed Mandel that he was ineligible for a visa under Section 212(a)(28) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28), a copy of which was enclosed. That Section provides in part that aliens who "advocate the economic, international, and governmental doctrines of World communism" and aliens "who write or publish * * * any written or printed matter * * * advocating or teaching * * * the economic, international, and governmental doctrines of world communism" shall be ineligible to receive a visa and shall be excluded from admission into the United States. 8 U.S.C. 1182(a)(28)(D) and (G)(v). The letter also explained that a request for a waiver of ineligibility, which the consul had sub-

mitted pursuant to Section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), had been refused. Under that provision the Attorney General may in his discretion direct that a visa be granted after "approval by the Attorney General of a recommendation by the Secretary of State" that an alien be "admitted temporarily despite his inadmissibility." The consul noted that Mandel had been granted waivers on his prior visits to the United States in 1962 and 1968. In conclusion, the consul informed Mandel that a second request for waiver, which had been forwarded after Mandel filed a second visa application on October 22 with a more extensive proposed itinerary, was currently pending (App. 6a).

In regard to Mandel's original visa application in 1969, the Secretary of State declined to recommend that the ineligibility provision be waived because although Mandel's earlier waivers in 1962 and 1968 were conditioned on his conforming to the itinerary, activities and purposes set forth in his applications, he engaged in activities beyond the stated purposes of his trip in 1968. But upon reconsideration and in view of the fact that in 1968 Mandel may not have been aware that he was required to conform to his itinerary, the Secretary recommended waiver to the Attorney General. However, the Attorney General refused to grant this and so notified Mandel's attorney on February 13, 1970, stating that on Mandel's last visit his activities "went far beyond the stated purposes of his trip." (App. 6a-7a.)

Mandel, joined by the American plaintiffs, then instituted this suit against the Attorney General and the Secretary of State, claiming that the statutory provisions are unconstitutional and that their application to Mandel was arbitrary and unreasonable. Specifically, the American plaintiffs argued that Mandel's exclusion deprived them of the opportunity to hear him speak and to debate with him, in violation of their rights under the First Amendment and that Section 212(a)(28) is therefore unconstitutional on its face and as applied. Mandel and the other plaintiffs also claimed that the Act denied equal protection of the law by excluding leftists but not rightists and violated due process by failing to provide standards for the exercise of the Secretary's and the Attorney General's discretion with respect to permitting waiver of ineligibility, and that the Attorney General acted arbitrarily in refusing to accept the Secretary's recommendation that Mandel be admitted temporarily. Plaintiffs sought an injunction against the operation of these provisions and a declaratory judgment. A three-judge district court was convened pursuant to 28 U.S.C. 2282.

The Court held that although Mandel had no individual right to enter the country, "the citizens of the country [have the right under the First Amendment] to have the alien enter and to hear him explain and seek to defend his views" (App. 22a-23a).¹ In the court's view, an alien could be excluded for advocating

¹ The court did not pass on plaintiffs' other contentions.

communism only if this amounted to "incitement or conspiracy to initiate presently programmed violence" (App. 24a), but where a prospective audience in this country awaits an alien, he cannot otherwise be refused a visa on the basis of his political affiliations or philosophy—neither the Executive nor Congress has any such discretion to exercise (App. 25a). The court therefore issued an "injunction against the defendants' implementing and enforcing Sections 212(a)(28) and 212(3)(A) * * * so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor" and a "declaratory judgment that Section 212(a)(28) is invalid and Section 212(d)(3)(A) is inoperative so far as they have been invoked to find plaintiff Mandel ineligible for admission * * *" (App. 28a). Judge Bartels dissented on the basis that although the majority recognized "the sovereign power to exclude in the interest of self-preservation, they subordinate this interest to the First Amendment interest by applying standards invoked exclusively to strictures upon speech by American citizens and strictures upon the right of American citizens to hear other American citizens" and, in so doing, the "majority has ignored the crucial fact that [Section 212(a)(28)] serves the important objectives of (1) national security and (2) foreign policy * * *" (App. 36a).

THE QUESTIONS ARE SUBSTANTIAL

In this case the three-judge district court has held a significant provision of the Immigration and Nationality Act of 1952 unconstitutional. The need for review of that decision by this Court is apparent.

Ever since there have been national states it has been recognized that admission of aliens is a purely political matter and that the exclusive power to exclude or admit foreigners and to prescribe the applicable terms and conditions is inherent in sovereignty. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659. This settled principle of international law has been affirmed time and again by this Court. From *The Chinese Exclusion Case*, 130 U.S. 581, to *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, the Court has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." 387 U.S. at 123. With respect to the extent of this power, there is, as Mr. Justice Frankfurter stated for the Court in *Galvan v. Press*, 347 U.S. 522, 531, "not merely 'a page of history,' * * * but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." In sum, "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Id.* See also *Harisiades v. Shaughnessy*, 342 U.S. 580.

The district court's failure to follow this long line of authority cannot rest on the supposed distinction that here the exclusion of Mandel deprives certain American citizens of the chance to hear and confront Mandel in person, which the district court considered to be part of their right to free speech under the First

Amendment. The exclusion of any alien for any reason forecloses the opportunity for persons in this country to associate with him here, to hear him speak in person in the United States and to engage here in face-to-face exchanges of thoughts. Yet even though refusing an alien permission to enter will always have those consequences, this Court has repeatedly held that the decision to exclude and the grounds for admissibility are not matters for judicial inquiry. See, in addition to the cases cited *supra*, *United States ex rel. Knaufl v. Shaughnessy*, 338 U.S. 537, upholding the exclusion of the alien wife of an American citizen; *United States ex rel. Turner v. Williams*, 194 U.S. 279, sustaining the deportation of an alien who was an anarchist only in the philosophical sense. Of course, in none of these cases does exclusion of the alien foreclose the possibility of associating with him elsewhere or of otherwise communicating with him. Cf. *Layton v. Postmaster General*, 381 U.S. 301.

Determining what aliens should be allowed to enter even on a temporary basis involves considerations not only of national security, but also of foreign policy. Section 212(a)(28) and its discretionary application are, fundamentally, expressions of American foreign policy, and are subject to revision only by the appropriate political branches of the government. However, the district court's decision, if allowed to stand, transfers the power to decide what aliens may come into the United States to any individual citizen or group of citizens who might claim that they would like to confront the alien in person. In *Zemel v. Rusk*, 381

U.S. 1, this Court upheld the denial of passports to American citizens desiring to visit Cuba despite the fact that this "renders less than wholly free the flow of information concerning that country." 381 U.S. at 16. There are even more compelling reasons for sustaining Congress' exclusive power to refuse to grant visas to certain aliens, including Mandel and those similarly situated.

CONCLUSION

The questions presented by this case are substantial. Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1971.

APPENDIX

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF
NEW YORK

70 C 344

ERNEST MANDEL, DAVID MERMEI STEIN, WASSILY LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK, PLAINTIFFS,

against

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, WILLIAM P. ROGERS, SECRETARY OF STATE, DEFENDANTS.

Appearances:

LEONARD B. BOUDIN, ESQ. (MESSRS. RABINOWITZ, BOUDIN & STANDARD AND DAVID ROSENBERG, ESQ. OF COUNSEL) FOR PLAINTIFFS.

LLOYD H. BAKER, ESQ. (EDWARD R. NEAHER, ESQ. UNITED STATES ATTORNEY, OF COUNSEL) FOR DEFENDANTS.

Before: FEINBERG, U.S.C.J., BARTELS AND DOOLING,
U.S.D.JJ

DOOLING, D.J.

The suit seeks a declaratory judgment that on its face and as applied Section 212(a)(28) and (d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(28), (d)(3)(A) is unconstitutional. Section 212(a)(28) of the Act declares ineligible for visas and excludes from admission to the United States aliens who are or at any time were members of described classes of aliens identified with

certain leftist and extremist political doctrines; Section 212(d)(3)(A) authorizes the temporary admission of an ineligible and excluded alien in the unbounded discretion of the Attorney General after the Attorney General approves a recommendation of the Secretary of State or the consular officer that the alien be admitted temporarily despite his ineligibility. Plaintiff Mandel, who had been admitted in the Attorney General's discretion exercised under Section 212(d)(3)(A) in 1962 and 1968, was denied admission in 1969 on the ground that the consular officer had found him ineligible for a visa "because his subversive affiliations," and his "flagrant abuse of the opportunities afforded him to express his views in this country" during his 1968 visit made a favorable exercise of the discretion to admit him unwarranted.

Plaintiff Mandel is joined in his suit by professors of institutions of higher education some of whom had invited him to speak on specified dates in 1969 at specified colleges or universities and at three conferences. Alleging that the plaintiff professors and other citizens desire to have Mandel speak at universities and other forums to hear his views and engage in "free and open academic exchange," that they have to that end invited him to participate in a series of university conferences and public forums, that Mandel has accepted the invitation and that clearing his admissibility in advance of again setting up a schedule of appearances is necessary, plaintiffs charge that Section 212(a)(28) and (d)(3)(A) of the Act is invalid under the First and Fifth Amendments as imposing a prior restraint on constitutionally protected communication, predicated exclusion on belief and advocacy not allied with "unlawful speech or conduct," denying the equal protection of the law in excluding leftists but not rightist extremists, failing to

provide due process safeguards for determining ineligibility, and failing to provide standards for the exercise of the Attorney General's discretion to exclude, and, that in the particular case of Mandel, the Secretary and Attorney General have acted arbitrarily without evidence sufficient to support a finding of ineligibility, or to furnish a basis for rejecting the Secretary's recommendation that Mandel be admitted temporarily.

Plaintiffs move for a preliminary injunction restraining the Attorney General and Secretary of State from enforcing Section 212(a)(28) and (d)(3)(A) of the Act as against plaintiffs. Since the injunction sought would restrain the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution, a three judge court is required to pass on the motion and has been designated by the Chief Judge of the Second Circuit, 28 U.S.C. §§ 2282, 2284.

It is concluded that plaintiffs are entitled to the preliminary injunction they seek.

The parties agree that there is no relevant controversy on the facts, and that the facts presented lead directly to the heart of the questions of "standing" and validity that the case presents.

Ernest Mandel is a citizen of Belgium, editor-in-chief of the Belgian Left-Socialist weekly LA GAUCHE, and the author of a two volume text entitled "Marxist Economic Theory" published in 1969. It appears not to be denied that Mandel can correctly be categorized as "an orthodox Marxist of the Trotskyist school," and in a speech, said to have been given by tape recording at a conference in New York on November 29, 1969, Mandel described himself as "an exponent" of the doctrine of Karl Marx. The text

of the speech is resolutely Marxist in its claims (*e.g.*, referring to the trend of working-class initiatives in Western Europe as indicating revolutionary potential, the text continues "And this is why a revolutionary strategy in the Marxist sense of the word is both possible and indispensable, if the new upsurge of working-class militancy which is now in full swing in Europe is not to end in defeat as it did in the previous three main periods of upsurge: that at the end of World War I; that during the mid-thirties; and that at the end of the World War II"). The speech concludes, in a passage that at once exemplifies Mandel's academic advocacy of revolutionary doctrine and marks its difference from incitement to subversive action:

"This conclusion brings us back to the starting point. What are the agencies of social change in the West today? It is the basic thrust of the productive forces themselves, undermining, eroding, and shaking periodically in a violent way private property, the nation-state, and generalized market economy. It is the inevitable periodic explosions of labor's discontent against its alienation as producer, against the capitalist relations of production at plant level, locally, regionally, or nationally. It is the reemergence of revolutionary consciousness in the youth through the transmission belts of the colonial revolution, the student revolt, the rise of a new generation of revolutionary teachers, scientists, technicians, and intellectuals. It is the potential fusion of that revolutionary consciousness with large masses of workers through campaigns and actions for transitional demands, culminating in workers' control of production. And it is the building of the revolutionary party and the revolutionary International. The better we succeed in combining all these elements, the closer we shall

be to a socialist world and to the emancipation of labor and of all mankind!"

It is not claimed that Mandel is a member of the Communist Party or its affiliates, and Mandel has asserted on his visa applications that he is not.

Mandel had been admitted to the United States in 1962 (as a working journalist) and again in 1968; on both occasions—although the Department of State concedes that the fact was not brought home to him—after a finding of political ineligibility and an exercise in his favor of the Attorney General's discretion to admit him temporarily under Section 212(d)(3) of the Act on recommendation of the Department of State. During his 1968 visit Mandel accepted speaking engagements at more than 30 universities or colleges in the United States and Canada (including Harvard, Swarthmore, Antioch, Michigan, Notre Dame and Berkeley); he was at Columbia three times, at the University of Pennsylvania twice, and spoke at the Socialist Scholars Conference at Rutgers. His visit apparently extended from early September until November.

In 1969 Mandel was invited to participate in a conference on "Technology and the Third World" at Stanford University on October 17 and 18 as a speaker and as a panelist to discuss a speech to be given by Professor John K. Galbraith of Harvard; he was the recipient also of faculty requests to speak or lecture during his visit at several universities or colleges including Princeton, Amherst, the New School, Columbia and Vassar, of a student-group request to participate in a conference on social and economic conversion to the demands of a peace-oriented society at Massachusetts Institute of Technology, and he was to speak at a conference arranged by the Bertrand Russell Peace Foundation and the Socialist Scholars

Conference on "Agencies of Social Change," his individual subject to be "Revolutionary Strategy in the Imperialist Countries."

Mandel applied in Brussels for a visa on September 8, 1969, to attend the Stanford conference, to leave for the United States on October 14 and stay six days. He was told orally on October 23 and by letter of October 30, 1969, that a visa and waiver had been refused; the letter explained that he had been ruled ineligible for admission under Section 212(a)(28) in 1962, that in 1962 and in 1968 upon Embassy recommendation the Department of State had exercised its discretion to grant temporary admission under Section 212(d)(3), but that the waiver requested of Washington in September had been denied. The Consul advised that a second request for waiver was being forwarded in connection with Mandel's new-filed application of October 22 for a visa to lecture and attend conferences at various institutions. A State Department letter of November 6, 1969, to plaintiffs' counsel explained that the earlier "waivers" were conditioned on conformity to the itinerary, activities and purposes stated in the visa application, that in 1968 Mandel had engaged in activities beyond the stated purposes of his trip, that on that ground a waiver had not been sought on the September visa application, but that since Mandel may not have known the conditions on which the earlier visas had been issued, and had now engaged to conform to his stated itinerary and purposes, the Department was reconsidering his case and discussing it with the Department of Justice. On January 27, 1970, the Department of State advised the Bertrand Russell Peace Foundation that the Department of State

"... in the interest of free expression of opinion and exchange of ideas, [had] recommended

a waiver for Mr. Mandel. The Immigration and Naturalization Service (acting for the Attorney General) responded that a waiver was not warranted."

By letter of February 13, 1970, the Department of Justice (Immigration and Naturalization Service) advised plaintiffs' counsel, after explaining the earlier determination that Mandel "was ineligible . . . because of his subversive affiliations," that

"On his last visit in 1968, Mr. Mandel's entry was authorized for a series of academic engagements in the United States. His activities, while here, were much reported to the press and went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country.

"Accordingly, when the recent recommendation was made that he be permitted to enter for a third time, it was concluded that the favorable exercise of discretionary authority provided under the Immigration and Nationality Act was not warranted and his temporary admission was not authorized. There is no basis for changing this determination."

The plaintiffs other than Mandel are citizens of the United States who had issued invitations to Mandel in 1969 (i.e., plaintiffs Birnbaum, Heilbroner), or were to participate in programs in which Mandel was also invited to participate (i.e., Chomsky), or wish to have Mandel speak at universities and other forums. It is alleged that plaintiffs are unable to set dates for a program of appearances because Mandel's eligibility status make it impossible to assure his appearance. Plaintiffs have on the basis joined Mandel in the present suit to enjoin enforcement against him of the exclusion provision on constitutional grounds.

The Government opposes the motion on the ground, not challenged, that Mandel is an advocate of the "economic, international and governmental doctrines of world communism" and therefore ineligible to receive a visa under Section 212(a)(28)(D) and also an alien who writes and publishes matter advocating and teaching the doctrines of world communism and therefore ineligible to receive a visa under Section 212(a)(28)(G)(v). The Government's position is that the Attorney General is not required to have factual support for or to justify his discretionary decision not to grant temporary admission since the power to exclude is absolute and waiver of exclusion purely a matter of grace.

To determine the ultimate issue in the case and the dependent issue of "standing" requires first an analysis of the substantive content of Section 212(a)(28) in its relation to the First Amendment, and then a consideration of the effect of the statute's operating only to define occasions for a discretionary exercise of the plainly sweeping power to exclude aliens (*Boutilier v. Immigration & Naturalization Service*, 1967, 387 U.S. 118, 123-124; *United States ex rel. Knauff v. Shaughnessy*, 1950, 338 U.S. 537, 542-544). Section 212(a)(28) is one lengthy part of a set of exclusions and definitions in the Act all of which bear to some extent on the interpretation of Section 212(a)(28). The relevant parts of Sections 101(a)(37), (40), 212(a)(9), (10), (27), (28), (29), (d)(3), (5), (6), 235(c) (8 U.S.C. §§ 1101(a)(37), (40), 1182(a)(9), (10), (27), (28), (29), (d)(3), (5), (6), 1225 (c)) are given in the Appendix.

Subsection (a)(28) treats as substantively evil political doctrines, associations and activities (A) anarchy, (B) opposition to all organized government, (C) the Communist Party of the United States, any other

totalitarian party of the United States, the Communist Political Association, and their local counterparts, (D) the economic, international, and governmental doctrines of world communism, and (F), (G)(i) the overthrow by force, violence or other unconstitutional means of the Government of the United States or of all forms of law, (ii) the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally), (iii) the unlawful damage, injury, or destruction of property, (iv) sabotage, and (v) the establishment in the United States of a totalitarian dictatorship. The existence of valid Governmental power to prevent by anticipation the translation of the proscribed doctrines into the forbidden subversive activities may be considered established at least at the extreme of likely incitement to or production of subversive action, for at that point pure communication is not involved, but the verbal steps that set attack in train are being taken. *Dennis v. United States*, 1951, 341 U.S. 491, 508, 510-512, 545 (concurring opinion); *Yates v. United States*, 1957, 354 U.S. 298, 324-325, 340 (Black, J. concurring and dissenting); *Brandenburg v. Ohio*, 1969, 395 U.S. 444, 447; cf. *Scales v. United States*, 1961, 367 U.S. 203, 228-229. Subsection (a)(28), however, is explicit in its selective direction against that which is specifically not active subversion but belief and preachment. It operates not only against present adherence to disfavored political doctrines, associations and programs but also against any past adherence to them. It embraces not advocacy alone but teaching as well; and any affiliation with any organization that either advocates or teaches the doctrines or programs. It reaches not only personal advocacy or teaching but also either writing or publishing or wittingly circulating or printing or displaying (or possessing for any of those purposes) any

printed or written matter advocating or teaching the disfavored doctrines or programs; beyond that it extends to membership in or affiliation with any organization so resorting to the printed or written word or its circulation. Present or past Communist party membership or affiliation are also embraced in the subsection.

The Government points to Subsection (a)(28)(D) and (G)(v) as particularly applicable to Mandel. The first part, (a)(28)(D) defines a class whose members are neither anarchists, nor advocates or teachers of opposition to all organized government, nor members of or affiliated with any organization that advocates or teaches that doctrine, nor a member of or affiliated with any Communist or Totalitarian Party (or their predecessor or successor organizations) but who are, or at any time have been, advocates of the economic, international, and governmental doctrines of world communism or advocates of the establishment in this country of totalitarian dictatorship, or who are members of or affiliated with any organization that advocates such communism or totalitarianism either through its own utterances or through publications it either issues or permits or authorizes or finances. The second part, (G)(v), describes those who are or ever have been members of the class of aliens who write or publish, or knowingly circulate, print, display (or possess for those purposes) any written or printed matter advocating or teaching the economic, international, and governmental doctrines of world communism or advocating or teaching the establishment in this country of a totalitarian dictatorship. Because the strictures of the statute thus calculatedly fall precisely upon teaching and advocacy as such, they are, unless their presence in an alien exclusion code alters the result, invalidated by the First Amendment.

Brandenburg v. Ohio, 1969, 395 U.S. 444; *United States v. Robel*, 1967, 389 U.S. 258, 262.

The statutory strictures are not relieved of the directness of their impact on interests protected by the First Amendment because they do no more than add to the number of the aliens who may be excluded. In the context in which Section 212(a)(28) functions it operates to exclude only aliens who by every other statutory standard of admissibility are not excludable; it excludes them not for any reason related to their alienage but solely for their present or former political associations, or doctrines, or advocacies, or teachings. The sole and selective effect of the statute is to operate as a means of restraining the entry of disfavored political doctrine, and it is a forbidden enactment. *Lamont v. Postmaster General*, 1965, 381 U.S. 301, 305; cf. *Near v. Minnesota*, 1930, 283 U.S. 697, 713-721; *Aptheker v. Secretary of State*, 1964, 378 U.S. 500, 510-511; *Shuttlesworth v. City of Birmingham*, 1969, 394 U.S. 147, 150-151.

The subsection does not deal with subversive activities. Subsections (a)(27) and (a)(29) deal with "activities." Subsections (a)(27) excludes aliens who, it is officially believed, seek to enter "solely, principally, or incidentally" to engage in activities prejudicial to the public interest or to endanger the welfare, safety or security of the United States. Subsection (a)(29) excludes aliens who, it is officially believed, "probably would, after entry," either (A) engage in activities prohibited by the laws of this country relating to "espionage, sabotage, public disorder, or in other activity subversive to the national security," or (B) "engage in any activity the purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other uncon-

stitutional means." Subsection (d)(3) operatively contrasts subsection (a)(28) with subsections (a)(27) and (a)(29). Subsection (d)(3) pointedly withholds the discretionary power of temporary admission from the Secretary of State and the Attorney General in the case of aliens inadmissible under Subsection (a)(27) and (a)(29). (They may be paroled into the country temporarily "for emergent reasons or for reasons deemed strictly in the public interest." See subsection (d)(5))

The effect of Subsection (a)(28) on interests protected by the First Amendment is not here an unintended and tolerable effect of a valid exercise of a power of Government directed to an end other than limitation of First Amendment rights. That was the case in *United States v. O'Brien*, 1968, 391 U.S. 367: fair and effective exercise of the power of conscription required registration of those eligible for conscription and their identification; thence flowed the power to forbid mutilation or destruction of Selective Service certificates notwithstanding that particular acts of destruction might be intended as dramatic communications of the registrants' political opposition to the Vietnam hostilities (391 U.S. at 381-382); the terms of the statute did not limit its penal sanction to the cases of "symbolic speech" but, conspicuously, comprehended furtive destruction by draft evaders or others. So too in *Teague v. Regional Commissioner*, 2d Cir. 1968, 404 F.2d 441, cert. denied, 1969, 394 U.S. 977 (three justices dissenting, two in an opinion of Mr. Justice Black) the statute and regulations were addressed to withholding American currency from areas with which the Government had, under the Trading with the Enemy Act, suspended substantially all trade except under license; the control

scheme was held not invalid as it applied to publications since it was not addressed to restricting the flow of ideas and only incidentally burdened that flow, nor did it select publications according to their content for restriction.

In the present case the impact of subsection (a)(28) on interests protected by the First Amendment is not outweighed by any compensating protection it gives against an evil shown to be grave to some interest clearly within the sphere of governmental concern. Cf. *Speiser v. Randall*, 1958, 357 U.S. 513, 527. Where a distinct governmental interest of importance is sought to be subserved and effective pursuit of it involves a calculated sacrifice of First Amendment interests that could not otherwise be found valid, the importance of the governmental interest weighed against the degree of First Amendment loss may, it has been thought, be found on balance to justify a limited sacrifice the First Amendment interest. *American Communications Association v. Douds*, 1950, 339 U.S. 382, 392-400; *Konigsberg v. State Bar of California*, 1961, 366 U.S. 36, 50-51. But *United States v. Robel*, 1967, 389 U.S. 258, 264-268 (and see footnote 20), if it does not altogether reject such analysis, confines it narrowly, and seems at minimum to exact a demonstration that there was no reasonable alternative, and that the statute has the least drastic impact on First Amendment interests that the circumstances admit. Subsection (a)(28), however, is not within the class of enactments to which the "balancing" test could apply. The power to exclude aliens is not questioned: there is not here any distinct aim of the exercise of that power that is primary and to the attainment of which the restraint of First Amendment interests is sacrificed in a secondary or mediating

exercise of power. Here the substance of the exercise of the power is the restraint on interests protected by the First Amendment.

The further question is whether the strictures of subsection (a)(28), although such strictures are forbidden as part of domestic law, may nevertheless be valid when used to classify aliens and exclude them absolutely or conditionally; it might be supposed that if the ultimate evil guarded against—violent revolution or subversion by revolutionary communism—were peculiarly connected with alien sources and peculiarly likely to be activated by alien emissaries, such considerations might justify an abridgement of freedom of speech, press and assembly at a point well before they could be shown to be instances of present incitement. *United States ex rel. Turner v. Williams*, 1904, 194 U.S. 279, sustained the deportation of a resident alien where evidence before the board of inquiry supported the conclusion that Turner was an anarchist in the popular sense of being one who believed in or advocated the overthrow of the government or of all government by force or the assassination of officials, and the Court was unable to say (194 U.S. at 294) "that the inference was unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end." But Mr. Chief Justice Fuller indicated that the national interest in self-preservation warranted the Congress, despite the First Amendment, excluding philosophical anarchists, innocent of evil intent, if the Congress was of opinion that the tendency of the general exploitation of such views was so dangerous to the public weal that aliens holding and advocating such views should not be added to the population. Mr. Justice Brewer put his concurrence on the narrow

ground that the evidence supported a deduction that Turner was an anarchist in the sense of "one who urges and seeks the overthrow by force of all government." Cf. *Dennis v. United States*, *supra*, 341 U.S. at 509-515. If *Turner* were thought to imply that a different and looser test of First Amendment validity can be applied in alien deportation and exclusion cases, *Harisiades v. Shaughnessy*, 1952, 342 U.S. 580, 591-592, appears clearly to assume that such cases must meet the standard of *Dennis*; the Court did not rely upon *Turner* (which was cited to it) nor invoke the argument (made to it) that the power to expel aliens is an attribute of sovereignty essentially relating to foreign affairs and national safety and, therefore, not restricted impliedly by provisions of the Constitution which do not expressly relate to it. More clearly, *Aptheker v. Secretary of State*, 1964, 378 U.S. 500, 510-512, imposed the *Dennis* standard in a cognate field to invalidate passport control of the travel of citizens identified as members of the Communist Party. Cf. *Kent v. Dulles*, 1958, 357 U.S. 116, 130. So, in the equally if not more sensitive area of employment in defense industry, absence of the *Dennis* limitations was fatal to the effort to exclude members of organizations operating primarily to advance the objectives of the world Communist movement. *United States v. Robel*, *supra*, 389 U.S. at 262-268; Cf. *Shelton v. Tucker*, 1960, 364 U.S. 479, 486-487, 488 (Cannot require public school teacher to disclose all associational ties despite recognized state concern for teacher competence and fitness).

That the Congress and the states have been steadily concerned with the threat of international world communism and with anarchistic doctrine that connotes revolution against all government would appear to be

a consequence of the doctrines' uncompromising inclusion as a critical element—and as their distinguishing element—of the teaching that a resort to revolution is necessary, that subversion of existing government by force and violence is a necessity. The doctrines are viewed as teaching and are denounced because they affirmatively teach that it is futile to aspire to alter the plan of government or its programs through the means of representative government and that the entire frame of government, including its basic Constitution, must be uprooted by the forcible seizure of the total power to govern. Although the nature of the doctrines explains the degree and persistence of legislative concern with them, the First Amendment has been held nonetheless to exact a dichotomy between the protected freedom to preach the doctrines thus legislatively pronounced to be abhorrent to the nation's free institutions and the punishable illegality of taking significant action to initiate subversion and revolution. The difficulty and the necessity of drawing that fundamental distinction appears no less from *Dennis* and *Yates* than from *Communication Workers* and *Robel*. The nature of the First Amendment in its relation to the basis of government under the Constitution explains the distinction, the reason why the Amendment must prevail as well in the context of the power to exclude aliens and the reality of the plaintiffs' standing to challenge the subsection in the present action.

New York Times Co. v. Sullivan, 1964, 376 U.S. 254, marks the emergence in clarity of the view of the First Amendment as a fundamental principle of the form of American constitutional government; accepting the premise that the people, not the government, possess the sovereignty, and that by the First Amend-

ment they emphasized the withholding from the federal government of the power to make laws affecting (in *Sullivan*) the freedom of the press, the Court considered that the power was denied as well to the states by the Fourteenth Amendment's incorporation of the First Amendment. The Court found in the turbulent history of the Sedition Act of 1798 the first crystallization of national awareness of the central meaning of the First Amendment, and that the right of free public discussion of the stewardship of public officials was, as Madison had then asserted, a fundamental principle of the American form of government (376 U.S. at 273-278). The Court quoted Madison's sharp comment, earlier, in 1794, that "the censorial power is in the people over the Government, and not in the Government over the people." That comment was made in course of an extended debate in the House on a motion to include in a response to President Washington's report of the military steps he had taken to put down the so-called "Whisky Rebellion," a "reprobation" of the role in the rebellion of certain "self-created societies" (4 Annals of Congress, p. 899, 946, [1794]); President Washington had charged "certain self-created societies" with attempting to help defeat the operation of the excise tax by "assuming the tone of condemnation" (4 Annals of Congress, p. 788). The motion to include the censure of the self-created societies was overwhelmingly defeated (4 Annals of Congress, p. 945) despite arguments that such a vote might appear to deny support to the President and that mere censure of utterance did not imply or rest on a presumption of power to legislate against such utterances. (4 Annals of Congress, pp. 899-946) *West Virginia State Board of Education v. Barnette*, 1942, 319 U.S. 624, 641, 642,

had earlier than *Sullivan* indicated an approach similar to that of *Sullivan*, the Court there saying that, "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority . . . freedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." In the later case of *Garrison v. Louisiana*, 1964, 379 U.S. 64, extending the principle of *Sullivan* to the criminal libel context, the Court again observed that "speech concerning public affairs is more than self-expression; it is the essence of self-government" (379 U.S. at 74-75). The First Amendment, thus, guarantees to the people as sovereign as the retained attribute of their ultimate sovereignty their right, on open and wide-ranging debate, publication and assembly, to review the government they have created, the adequacy of its functioning and the presence or absence of a need to alter or displace it. See Meiklejohn, The First Amendment is an Absolute (The Supreme Court Review, 1961, Kurland ed.) 245, 255-263; Kalven, The New York Times Case: A Note on the Central Meaning of the First Amendment (The Supreme Court Review, 1964, Kurland ed.) 191, 207-210, 220-221; Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 1965, 79 Harv. L. Rev. 1, 10-14, 18-19.

The exercise of Congressional power that permissibly affects speech, press or assembly cannot be a direct exercise of a power to control speech, press or peaceable assembly, but can only be an exercise of some other and undoubted power directed to an end

other than 'restricting speech, press or peaceable assembly. In the case of such statutes as the Smith Act (18 U.S.C. § 2385), directed against subversive activity, a source of the power can readily be found in the express Congressional power to suppress insurrection (Article 1, Sec. 8, Cl. 15), and the Smith Act as an exercise of that power is justified, as *Dennis* shows, in terms of the immediacy of its relation to the preventing of subversive action (341 U.S. at 501, 509-510); in *O'Brien* the power is the power to raise and support armies (391 U.S. at 377) and the particular exercise of it is justified in terms of its relation to that end (391 U.S. at 380); but in the case of *Robel*, although the Congress is exercising the war power, the attempted exercise is invalid under the First Amendment because the restriction on the rights of association is not proximately related as in *Dennis*—to preventing insurrection that would threaten the achievement of the war-power objective (389 U.S. at 264-266); and, similarly, in *Aptheker* the power is the power to provide for national security and the attempted exercise of it fails because, again, the magnitude of the effect of the inclusively phrased statute on First Amendment rights is not justified by the immediacy of the relation of the particular exercise of the security power to the achieving of the security objective (378 U.S. at 507, 508-509, 512-513). *Robel* and *Aptheker* make clear that it is not enough that an undoubted Congressional power is being exercised; the effect on First Amendment rights is justified only if the particular exercise of the power unavoidably entails that effect as an unsought incident to attaining the end for which the legislative power exists and is exercised. Cf. *Brandenburg v. Ohio*, *supra*, 395 U.S. at 447-448.

The nature of the First Amendment rights as a retained attribute of the sovereignty of the people is reflected in the emphasis that recent adjudications particularly have given to the "right to hear." *Lamont v. Postmaster General*, 1965, 381 U.S. 301, illustrates this in keeping unfettered the right of an addressee to receive communist political propaganda without having to request its delivery by the Post Office in writing. Cf. *Martin v. City of Struthers*, 1943, 319 U.S. 141, 143 (the right of freedom of speech and press embraces the right to distribute literature "and necessarily protects the right to receive it"). *Stanley v. Georgia*, 1969, 394 U.S. 557, 564, is explicit that the Constitution protects the right to receive information and ideas, that the right to receive information and ideas, regardless of their social worth, "is fundamental to our free society." And *Red Lion Broadcasting Co. v. F.C.C.*, 1969, 395 U.S. 367, 389-390 notes the paramountcy in the radio broadcasting context of the public right to hear under the First Amendment; the Court returned to the earlier statement in *Garrison* (379 U.S. at 74-75) that speech concerning public affairs is more than self-expression, "it is the essence of self-government." See also *Brooks v. Auburn University*, 5th Cir. 1969, 412 F.2d 1171, 1172; *Teague v. Regional Commissioner*, *supra*, 404 F.2d at 445 (dollar exchange regulations "impinge on First Amendment freedoms," but not impermissibly); *Molpus v. Fortune*, N.D. Miss. 1970, 311 F. Supp. 240, 249; *United States v. Thirty-seven (37) Photographs*, C.D. Cal. 1970, 309 F. Supp. 36, 38; *Smith v. University of Tennessee*, E.D. Tenn. 1969, 300 F. Supp. 777, 780; *Snyder v. Board of Trustees*, N.D. Ill. 1968, 286 F. Supp. 927, 931-932.

The presence of the First Amendment in the Bill of Rights rather than in the main body of the Con-

stitution does not imply that it is no more than a modal restriction on a general power elsewhere granted or assumed to exist by implication. The Pinckney Plan for a federal government would have included a provision respecting the freedom of the press (3 Farrand, *The Records of the Federal Convention of 1787*, (1937 rev. ed.) 595, 599, 609). His plan as presented included a clause that "The liberty of the Press shall be inviolably preserved" (2 Farrand, 334, 341). During the debates Pinckney and Gerry together moved to include in the Constitution a clause in that language, 2 Farrand 617; Sherman is reported in Madison's notes then to have said simply, "It is unnecessary—The power of Congress does not extend to the Press," and the clause was voted down (2 Farrand 618, *cf. ib.* 611). Pinckney in addressing the South Carolina legislature ascribed the absence of a free press clause to the Convention's conclusion that; "The general government has no powers but what are expressly granted to it; therefore it has no power to take away the liberty of the press. That invaluable blessing . . . is secured by all our state constitutions; and to have mentioned it in our General Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it." (3 Farrand 256; 4 Elliot, *Debates on the Adoption of the Federal Constitution*, 315–316.) Wilson made a similar argument to the Pennsylvania convention respecting the omission of a Bill of Rights (3 Farrand 143–144, 161–162 " . . . not only unnecessary but improper . . . Enumerate all the rights of men! . . . no gentleman in the late convention would have attempted such a thing;" see also 2 Elliot 435–436, 453–454) Hamilton in the *Federalist* (No. LXXXIV) emphasized in the same

way that the Constitution was not a pact between a people and their sovereign (as were Magna Charta and the Petition of Right), but was founded on the power of the people, marked no surrender of right by the people and required no express reservation of their unsundered rights—"Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?" Jefferson, who, as President, treated the Sedition Act as a nullity for constitutional reasons and "discharged every person under punishment or prosecution under the Sedition law", considered that the Congress had been denied the right to control the freedom of the press, the states only having the exclusive power; he noted that in general state laws made the presses responsible for slander "as far as is consistent with their useful freedom. In those states where they do not admit even the truth of allegations to protect the printer, they have gone too far." 1 Adams-Jefferson Letters (Univ. of N.C. Press, 1959) 275, 281. Cf. *Garrison v. State of Louisiana*, *supra*, 379 U.S. at 67-73, 75; *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 278-279, requiring recognition of the defense of truth.

Since the First Amendment is not in its primary and most significant aspect a grant by the Constitution to the citizens of individual rights of self-expression but on the contrary reflects the total retention by the people as sovereign to themselves of the right to free and open debate of political questions, the issue of "standing to sue" is immediately seen to be unreal. The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to

have him explain and seek to defend his views; that, as *Garrison* and *Red Lion* observe, is of the essence of self-government. Mandel's status as a party does not rest on any individual right to enter (for he has none) but exists only as against the effort to exclude him on a ground that denies to citizens of this country their primary rights to hear Mandel and debate with him. Here the plaintiffs other than Mandel are directly involved with Mandel's entry because they have invited him, and they expect to participate in meetings with him or expect to be among his auditors. No more is required to establish their standing. *Cf. Snyder v. Board of Trustees, supra*, 286 F. Supp. at 931-932; *Smith v. University of Tennessee*, E.D. Tenn. 1969, 300 F. Supp. 777, 780. The special relation of plaintiffs to Mandel's projected visit gives them a specificity of interest in his admission, reinforced by the general public interest in the prevention of any stifling of political utterance, that abundantly satisfies "standing" requirements.

Mandel is invited primarily to participate in university and college events. The essentiality of freedom of debate within the community of universities (*Sweezy v. New Hampshire*, 1957, 354 U.S. 234, 250, 262-263) has been repeatedly recognized and has drawn from the Court very strong expressions of the heightened importance of First Amendment rights in the field of education. *Shelton v. Tucker, supra*; 364 U.S. at 487, stated that, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Board of Regents*, 1967, 385, 589, 603, characterized the national commitment to academic freedom as a "transcendent value to all of us" and a special concern of the First Amendment "which does not tolerate laws

that cast a pall of orthodoxy over the classroom." See also *Tinker v. Des Moines Community School District*, 1969, 393 U.S. 503, 512; *Pickering v. Board of Education*, 1968, 391 U.S. 563, 568-569, 572, 574. In *Wieman v. Updegraff*, 1952, 344 U.S. 183, 195, Mr. Justice Frankfurter in a concurring opinion, warned that any inhibition upon the freedom of thought of teachers brought the First Amendment safeguards vividly into operation because unwarranted inhibition of the free spirit of teachers affects not only the teachers directly involved but unmistakably tends to chill that free play of spirit which all teachers ought to practice and to produce caution and timidity in the associations of potential teachers. That Mandel's visit is in general to be limited to the academic community gives particularized enhancement to the values for the self-governing process that are jeopardized by such exclusions as this case presents. A premise of the First Amendment is that free speech and press and peaceable assembly do not merely afford opportunity to teach and advocate political doctrines but by doing so assure that exposure of the vices and inadequacies of political doctrines that suppression, exclusion and silence cannot accomplish.

The prevention of the teaching and advocacy that is not incitement or conspiracy to initiate presently programmed violence is not in any degree a legitimate legislative objective but a forbidden one. It is forbidden, in ultimate analysis, because the public interest—expressed in the First Amendment—requires that the citizens as sovereign have access to, evaluate and accept or reject that teaching as well as every other teaching and advocacy.

It may remain true that in certain areas of administering the laws affecting immigration as they affect nonresident aliens not present in this country an all

but absolute discretion to exclude can be vested in the executive or found to exist in the executive independently of Congressional action. See *United States ex rel. Knauff v. Shaughnessy*, 1950, 338 U.S. 537, 542-544; *United States ex rel. Turner v. Williams*, *supra*; 194 U.S. at 289-291. Here the discretion is limited to the "waiver" aspect of the statute; the executive is given the power to admit temporarily those whom the state declares ineligible. No standards are established to govern the exercise of that discretion, and no procedural provision is made to assure that it is exercised with due process of law. Such an executive discretion to invoke or suspend the operation of the general national power to exclude aliens may exist where the uses of the discretion do not impinge on interests protected by the First Amendment, but that it cannot exist here flows from the nature of the rights involved. In this case the admission of Mandel is but a lever by which the constitutional rights of his prospective citizen audience are to be given effect; they, as the articulately concerned portion of the sovereign people, assert a very high title to support Mandel's admission. Cf. *Cobb v. Murrell*, 5th Cir, 1967, 386 F.2d 947.

Knauff, resting in large part on the supposedly relevant contrast between "right" and "privilege" (338 U.S. at 544) can have no application where the effect of the executive action is not to deny a "privilege" to a "rightless" alien but to abridge constitutional rights of citizens and curb the exercise within this country of rights of free speech and peaceable assembly. (Cf. Van Alstyne, *The Demise of the Right-Privilege in Constitutional Law*, 1968, 81 Harv. L. Rev. 1435.) The constitutional difference between the advocacy that cannot be suppressed and the incitement to violence that can be curbed is not lost by

translating the matter into the immigration context and calling upon the "discretions" possibly exercisable in certain areas in that field. *Cf. Harisiades v. Shaughnessy, supra*, 343 U.S. at 591-592). The case is not different, when tested as an instance of the exercise of an unlimited executive discretion to exclude, from the cases in which the power to regulate the use of the streets is relied upon. Whether the effect of ordinances regulating use of the streets is an indiscriminate or undiscriminating total exclusion, as in *Schneider v. State (Town of Irvington)*, 1939, 308 U.S. 147, 160-162, 163, or the establishment of a power to exclude except under a standardless licensing procedure, as in *Shuttlesworth v. City of Birmingham, supra*, 394 U.S. at 150-152, the First Amendment precludes the stifling effect despite the undoubted power to legislate generally for order in the streets. But, ultimately, due process is not an issue since the Government is without any power to act in the area defined by (a) (28) and the presence or absence of procedural due process in the attempted administration of subsection (d) (3) becomes irrelevant.

The views expressed in the thoroughly researched dissent fail to recognize that the First Amendment peremptorily forbids equating the implied power to exclude aliens in the interest of national security and the even conduct of international affairs with a power to abridge the freedoms of speech, press and peaceable assembly. The challenged parts of the Act as here applied do only the latter forbidden thing and do not reflect a genuine exercise of the implied power of alien exclusion. The dissent's argument comes very close to saying that Mandel can be excluded on the ground that he harbors a proscribed sentiment and preaches proscribed theories so long as his doctrines and teaching can be introduced by mail, by live television and

through the press; but, surely, it then becomes evident that the attempted justification for Mandel's personal exclusion on the ground of his preachments undercuts itself, for Mandel is under the Act excludable solely because of his identification with his doctrines, which admittedly cannot be excluded. *Zemel v. Rusk*, 1965, 381 U.S. 1, as the dissent points out, does not really touch First Amendment issues; it represents a finding that the general prohibition on travel to Cuba was not aimed at abridging First Amendment freedoms but only incidentally inhibited the flow to the United States of intelligence about Cuba; the Court recognized that inhibition "as a factor to be considered in determining whether [Zemel] has been denied due process of law: . . ." *Zemel* does not validate a program of inhibition of interchange of information and ideas, but approves a general limitation on travel to Cuba in spite of the countervailing circumstance that it inhibited access to political information. It is not correct to say that *Zemel* "sanctioned a virtual ban on informational intercourse with the then sole existing Latin American experiment in Communism"; rather, the Court was reconciled with that undesirable consequence of the Secretary's action because it was otherwise and independently justifiable by the national interest. So much appears abundantly from the care with which the Court distinguished and preserved the authority of *Kent v. Dulles*, 1958, 357 U.S. 116, on which *Zemel* so heavily relied; the Court in *Zemel* noted that in *Zemel's* case "the refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel." That is, the *Zemel* result was sustained only because unlike *Kent*, the travel ban was not linked to *Zemel's* opinions and affiliations.

It follows from what has been said that plaintiffs are entitled to an injunction against the defendants' implementing and enforcing Sections 212(a)(28) and 212(d)(3)(A) (8 U.S.C. §§ 1182(a)(28) and (d)(3)(A)) so as to deny plaintiff Mandel admission to the United States as a non-immigrant visitor and to a declaratory judgment that Section 212(a)(28) is invalid and Section 212(d)(3)(A) is inoperative so far as they have been invoked to find plaintiff Mandel ineligible for admission under Section 212(a)(28) and to deny him temporary admission under Section 212(d)(3)(A).

Settle order on notice.

March 18, 1970.

WILFRED FEINBERG, U.S.C.J.

JOHN F. DOOLING, JR., U.S.D.J.

APPENDIX

Immigration and Nationality Act of 1952, taken from 8 U.S.C. §§ 1101 et seq.

§ 1101. Definitions.

(a) As used in this chapter—

* * * * *

(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit,

and (B) the forcible suppression of opposition to such party.

(40) The term "world communism" means a revolutionary movement; the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

§1182. General classes of aliens ineligible to receive visas and excluded from admission; waivers of inadmissibility.

(a) Except as otherwise provided, in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), * * *

(10) Aliens who have been convicted of two or more offenses (other than purely political offenses), * * *

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of, or affiliated with any organiza-

tion that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the

time it is registered or required to be registered under section 786 of Title 50, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

[50. U.S.C. § 786 WAS REPEALED BY SECTION 59 OF PUBLIC LAW 90-237]

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assault-

ing or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (G) of this paragraph; . . .

(29) Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50; . . .

(d) (1) * * *

(2) * * *

(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant

visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27) and (29)), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa, and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (B) who is inadmissible under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27) and (29)), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

* * * * *

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(6) The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of excludable aliens applying for temporary admission under this sub-

section. The Attorney General shall make a detailed report to the Congress in any case in which he exercises his authority under paragraph (3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28) of subsection (a) of this section.

* * * *

§ 1225. Inspection by Immigration Officers.

* * * *

(c) Temporary exclusion; permanent exclusion by Attorney General.

Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraphs (27), (28), or (29) of section 1182(a) of this title shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

Bartels, District Judge (dissenting):

In substance, the question posed by this application for injunctive and declaratory relief is whether the inherent sovereign power to exclude aliens from entry into this country must bow to any interference with the right of Americans to hear under the First Amendment. The majority holds that subsections 212 (a)(28) and (d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(28), (d)(3)(A) [popularly known as the McCarran Act], are unconstitutional because the "sole and selective effect of the statute is to operate as a means of restraining the entry of disfavored political doctrine * * * " and further, that the sovereign power to exclude is irrelevant in this case to the constitutional inquiry because there is not here any distinct aim of the exercise of that power that is primary and to the attainment of which the restraint of First Amendment interests is sacrificed in a secondary or mediating exercise of power." Stated in another way, the majority holds that the accused subsection (a)(28) is directed to no end other than the limitation of First Amendment rights. In reaching this conclusion the majority applied to subsection (a)(28) of the McCarran Act the test enunciated in *Dennis v. United States*, 341 U.S. 494 (1951), proscribing strictures upon speech which merely advocates or teaches the "economic, international and governmental doctrines of world communism" without incitement to the use of force to accomplish that end; in other words, the "clear and present danger" test.

Reaching this conclusion they hold, in effect, that there is no room for the application of the "Balancing test" (cf. *Speiser v. Randall*, 357 U.S. 513 (1958)) and that there exists a "reasonable alternative" (cf.

United States v. Robel, 389 U.S. 258 (1967)). With all due respect, I cannot accept the majority's conclusion predicated upon this analysis.

My difference with the majority stems from the fact that while recognizing the sovereign power to exclude in the interest of self-preservation, they subordinate this interest to the First Amendment interest by applying standards invoked exclusively to strictures upon speech by American citizens and strictures upon the right of American citizens to hear other American citizens. In proceeding in this manner it seems to me that the majority has ignored the crucial fact that subsection (a)(28) serves the important objectives of (1) national security and (2) foreign policy, and that the exclusion of a disfavored political doctrine as expounded in person by an alien is not its aim but only a by-product.

Before discussing these two objectives, it is appropriate to note that the constitutionality of this statute could authoritatively rest upon the long-established principle that the Congressional power to exclude aliens is absolute.¹ From early times the Supreme Court has repeatedly held that no limits could be placed upon the power of Congress to exclude those

¹ This is a recognized principle of international law. In *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), Mr. Justice Gray stated: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *Vat. Law Nat. lib.* 2, §§ 94, 100; 1 *Phillim. Int. Law*, (3d Ed.) c. 10, § 220." I Oppenheim, *International Law* (8th. Ed. Lauterpacht) (1955) § 314; Westlake, *International Law*, part i, p. 219; IV Moore, *Digest of International Law*, § 550; Bouvie, *A Treatise on the Law Governing the Exclusion of Aliens in the United States* 3 (1912).

classes of aliens who were deemed, for reasons sufficient to the Congress, as undesirable for entry into the United States. *The Chinese Exclusion Case (Chae Chan Ping) v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895). In *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), this principle was clearly expounded by the court in validating the constitutionality of an enactment barring alien anarchists from entering the United States, even though innocent of evil intent. There the court said:

"If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, or as applicable to any alien who is opposed to all organized government." (p. 294).

The majority claims that *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), indicates that *Dennis*, not *Turner*, is the governing standard in the area of alien exclusion. But *Harisiades* dealt only with the question of deportation of resident aliens. Neither that case nor any other authority supports the conclusion that the *Turner* principle no longer defines the exclusion power. The continuing validity of the early cases has been repeatedly recognized by later decisions reaffirming the principle that the determination of which classes of aliens may enter and remain in the United

States is wholly within the sphere of the political branches of the government. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Harisiades v. Shaughnessy*, *supra*; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Galvan v. Press*, 347 U.S. 522 (1954). Thus, in concurring in *Harisiades*, Mr. Justice Frankfurter observed that

"The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, *the basis for determining such classification*, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control." (Emphasis supplied). (342 U.S. at 596-597).

Several years later, writing for the majority in *Galvan v. Press*, *supra*, Mr. Justice Frankfurter added:

"As to the extent of the power of Congress under review, there is not merely 'a page of history,' * * * but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. * * * But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." (347 U.S. at 531).

In *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967), Mr. Justice Clark remarked:

"It has long been held that the Congress has plenary power to make rules for the admission

of aliens and to exclude those who possess those characteristics which Congress has forbidden."

See also *Hitai v. Immigration and Naturalization Service*, 343 F. 2d 466 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Gordon and Rosenfield, *Immigration Law and Procedure*, § 2.2(a). (1968); Konyitz, *Civil Rights and Immigration* 3 (1953). The basis for this exceedingly broad application of the exclusion power is not difficult to ascertain. It is predicated upon the understanding that the power of Congress over admission of aliens touches "basic aspects of our national sovereignty, more particularly our foreign relations and national security." *Galvan v. Press*, *supra* at 530.

NATIONAL SECURITY

The Legislative and Executive responsibility for national security is the primary theme of the earliest cases rejecting attacks on applications of the exclusion power. See, e.g., *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*, *supra*, and *Fong Yue Ting v. United States*, *supra*). In according priority to this interest the courts have done no more than follow the concept of the framers of the Constitution. Madison, often referred to as the father of our Constitution, wrote:

"Security against foreign danger is one of the primitive objects of civil society.* * *

"* * * The means of security can only be regulated by the means and the danger of attack. The will, in fact, be ever determined by these rules, and by no others. *It is in vain to oppose constitutional barriers to the impulse of self-preservation.* It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." (Emphasis supplied.) *The Federalist* No. 41, pp. 204-205 (Everyman's Library 1961).

Hamilton repeated the axiom in these words:

"The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense." The Federalist No. 23, p. 111 (Everyman's Library 1961).

The early Supreme Court cases accordingly respected the Congressional determination that the entry into this country of certain classes of persons was a form of potential aggression and encroachment which need not be tolerated by a sovereign nation. A study of the Congressional findings which are the basis for the exclusionary provisions herein attacked demonstrates that a similar conclusion must be reached with respect to aliens falling within the prescribed classes.

Subsection (a)(28) of the Act tracked, in essence, Section 11 of Title I of the Internal Security Act of 1950, denominated the Subversive Activities Control Act of 1950. Section 2 of that Title set forth fifteen legislative findings derived from information concerning the world communist movement presented to a number of legislative committees. Among others, Congress found that

"(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world

through the medium of a world-wide Communist organization.

* * * * *

"(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law. * * *

"(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security."

Predicated upon these findings, Congress enacted the substantive provisions of the Act including the ineligibility rules here at issue. Viewed against this background these provisions do not appear to be solely a means of excluding a disfavored doctrine. Instead they manifest a considered legislative judgment that aliens who belong to Communist organizations and who espouse the doctrine of world Communism should not be permitted entry into the United States without prior Executive approval because of the objective threat which they pose to the national security since such individuals are more likely than others to engage in acts of sabotage, civil disruption, and illegal incitement to violence.

The majority's answer to this statement is that *United States v. Robel, supra*, renders such a judgment invalid because the statute fails to distinguish between protected and unprotected speech in determining the basis of exclusion. But *Robel* and its fore-

runner *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), are no authority for this conclusion. Neither involved the entry of an alien and in both cases the strict application of the "least drastic alternative" doctrine was predicated upon the finding that the provisions there at issue imposed a "substantial burden on protected First Amendment activities" (389 U.S. at 268). because the means chosen to implement the governmental purpose "cut deeply into the right of association" (389 U.S. at 264). In contrast, the impact on the First Amendment rights of American citizens resulting from the enforcement of subsection (a)(28) bears little, if any, resemblance to the substantial interference with such rights in *Robel* and *Aptheker*. Subsection (a)(28) does not purport to ban the espousal of world Communism by any American. Nor does it seek to ban the importation of books, articles, or pamphlets written by Mandel or any other alien expressing the exact doctrines that Mandel desires to lecture upon or debate about in the United States. If it be suggested that there is a difference between the visual and audio medium, the Act does not prevent the recording and presentation of the very lectures the American plaintiffs desire to hear. And if the excitement of intellectual debate is what is at stake, the plaintiffs may, as they have suggested, secure Mandel's participation by means of a transcontinental hook-up. While this is not to suggest that the vicarious presence of Mandel is in all respects equivalent to his actual presence, it does serve to illustrate the limited interference with the American plaintiffs' First Amendment rights here at stake.

Cases much closer than *Robel* and *Aptheker* in approximating the nature and extent of interference with the instant plaintiffs' First Amendment rights are

Teague v. Regional Commissioner of Customs, Region II, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969), and *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Teague* the court upheld a statute and regulations directing the Commissioner of Customs to detain packages originating in mainland China and North Vietnam until the addressee obtained a license authorizing their release. Since a license would not be granted unless payment for the packages was made into a blocked account, the court, in effect, held that the interest of the national government in stemming the flow of currency to certain nations was superior to an American citizen's interest in receiving a book or a pamphlet prepared in North Vietnam which he could not receive gratuitously and one which the publisher understandably would not send if payment could only be made into a blocked account. Such a ruling substantially forecloses the channels of certain intercontinental communications to the bulk of the American people who, as individuals, might desire information from these Communist nations. The fact that certain publications and films are licensed for importation without restriction as to the method of payments under programs approved by the Librarian of Congress or the National Science Foundation or are licensed in exchange for publications from the United States provides no assurance that one or more publications will be exempt from the Act, or that such publications will be available at any institution, or that any individual will be willing, in order to exercise his rights, to identify himself. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965). That the licensing regulations did not provide for the selective censorship of certain publications does not distinguish it from the instant case for it must be assumed that most of the

publications emanating from Communist nations will be in the nature of doctrinal propaganda, just as the majority assumes that those who have espoused the doctrine of world Communism in the past are likely to continue such advocacy upon arrival in the United States.²

² *Lamont v. Postmaster General*, 381 U.S. 301 (1965), is not to the contrary because in that case there was no compelling governmental interest requiring the enactment of the statute there called into question.

The right to hear, like the right of association, is not mentioned in the Constitution. Whether it carries the same credentials as the right to speak depends upon future delineation. Upon this subject the words of Mr. Justice White as joined in by Mr. Justice Harlan in the dissent in *Robel* are significant. "The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to assemble, and to petition for redress of grievances. [Footnote omitted.] While the right of association has deep roots in history and is supported by the inescapable necessity for group action in a republic as large and complex as ours, it has only recently blossomed as the controlling factor in constitutional litigation: its contours as yet lack delineation. Although official interference with First Amendment rights has drawn close scrutiny, it is now apparent that the right of association is not absolute and is subject to significant regulation by the State." 389 U.S. at 282-283.

Without attempting to delineate the contours of the derivative constitutional right to receive information, it is to be noted that other recent cases applying this principle have not involved important countervailing governmental interests. Thus it is difficult to find any compelling state interest in vesting arbitrary authority in state college administrators to determine who may or may not accept invitations to speak to faculty and student groups. See *Brooks v. Auburn University*, 412 F. 2d 1171 (5th Cir. 1969); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969); *Smith v. University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Snyder v. Board of Trustees of the University of Illinois*, 286 F. Supp. 927 (N.D. Ill. 1968); *Dickson v. Sitterton*,

Similarly, in the case of *Zemel v. Rusk, supra*, which involved a greater diminution in the free exchange of information and ideas than is here presented, the Supreme Court held that First Amendment rights were not even involved. In *Zemel* the court upheld the action of the State Department in banning travel to Cuba, which it had done pursuant to a statute providing that the Secretary of State may grant and issue passports under such rules as the President shall designate and prescribe for and in behalf of the United States.

To the appellant's argument that the "travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at firsthand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies", the court answered:

"We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition

280 F.Supp. 486 (M.D. N.C. 1968). Similarly, a holding that a state cannot convict a person for possessing obscene material in the privacy of his own home does not interfere with any governmental interest of national moment and was clearly as much founded on the right to privacy as it was on the First Amendment. *Stanley v. Georgia*, 394 U.S. 557 (1969). As in *Teague v. Regional Commissioner of Customs, Region II, supra*, the governmental interest herein involved is enormously more important than the interests at stake in the other cases.

(and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow * * *. *The right to speak and publish does not carry with it the unrestrained right to gather information.*" (381 U.S. at 16-17).

If "travel" to Cuba to obtain information is "action", it would also appear that "travel" by Mandel to the United States to impart information is likewise "action". And, if the right to speak and publish does not carry with it the unrestrained right to gather information and ideas for American audiences, then the right to hear does not carry with it the unrestrained right to have foreign citizens orate those ideas in the United States.

With respect to the relative degrees of decreased data flow, one must admit that *Zemel* presents a more sympathetic First Amendment case than the instant one. Whereas in the case at bar we are dealing with a limited obstruction to the exchange of ideas, in *Zemel* the court sanctioned a virtual ban on informational intercourse with the then sole existing Latin American experiment in Communism. See dissent of Mr. Justice Goldberg, citing Chaffee, *Three Human Rights in the Constitution of 1787*, 195-196 (1956); *The Supreme Court, 1964 Term*, 79 Harv. L. Rev. 123, 127 (1965); Note, *Resolving Conflict Between the Right to Travel and Implementing Foreign Policy*, 1966 Duke L. J. 233.

The holding of *Zemel* barring American citizens from witnessing at firsthand the practical operation of Communism in Cuba would seem to dispose of the majority's argument that the First Amendment requires that the citizens as sovereign have access in

person to every teaching and advocacy from all sources. It can hardly be said that the right to hear, as is the case with all First Amendment rights, is absolute and that it may not be limited or regulated by the government in certain circumstances. Cf. *Dennis v. United States*, *supra*; *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kovacs v. Cooper*, 336 U.S. 77 (1949). *Zemel's* rejection of the "access" argument without nice calculations as to whether the interest supporting the prohibition could have been effected in any more limited manner suggests that not all inhibitions on the free exchange of information and ideas are to be held to the exact standard applied in *Robel* and *Aptheker*.

While the *Robel* court held that classification by membership in the Communist Party in America was too broad, it is clear that such classification *per se* is not invalid even though it imposes some burden upon freedom of speech. In *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961), the Supreme Court affirmed an order of the Subversive Activities Control Board requiring the United States Communist Party to register as a "Communist-action organization" under Section 7 of the Subversive Activities Control Act of 1950. In so doing, the court expressly recognized that registration may entail some burdens on free expression due to the public obloquy associated with such membership. It nevertheless concluded that registration of (all members of) the Party without regard to the *quantum* of individual participation was constitutionally justified in view of the substantial danger presented by the Communist Party itself, as evidenced by the legislative findings of fact in Section 2 of the Act. In reaching this determination the court aptly remarked:

"But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of, possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods."

(367 U.S. at 96-97).

The majority contends that the national security concern manifested in the statute can adequately be protected by subsections (a)(27) and (a)(29) directly focusing on the potential illegal acts. Obviously, Congress in its legislative judgment, by enacting subsection (a)(28), believed these sections to be insufficient because of the unique and substantial threat to the security of the nation presented by members of the Communist movement who seek entry into this country. Even in domestic cases the danger presented by organizations engaged in illegal advocacy has been held sufficient to impose criminal sanctions with respect to active and knowing members of the Communist Party without a requirement that such member be actually engaged in such illegal advocacy. *Scates v. United States*, 367 U.S. 203 (1961). From this it logically follows that aliens possessing a similar membership in a similar organization can be justifiably excluded under subsection (a)(28). And while it is necessary in wholly domestic cases, such as *Scates*, *Aptheker*, and *Robel*, to make precise judgments as to the

extent of the individual's participation in the organization and his knowledge of the organization's illegal advocacy before imposing any significant burdens on him, the Government does not have the same opportunity to investigate the *quantum* and quality of an alien's participation in foreign organizations; nor does it have the same resources or power to screen the potentially subversive or other illegal activities of aliens seeking to enter this country; nor can the Government be expected to adequately delve into the precise goals or tactics of the many foreign Communist organizations. Persons within its borders are subject to its regulations, and legal processes—aliens are not. The legislatively determined clandestine nature of the Communist party, when operating in a foreign context, effectively precludes the precision of regulation of alien entries required by the majority. It is unreasonable and unrealistic to expect American consuls abroad to make such judgments as to alien members of the Communist movement on an *ad hoc* basis. Extension of the classification to also include aliens espousing world Communism is justified by similar considerations of secrecy and lack of information and investigative resources concerning the fact of formal affiliation with Communist organizations or concerning their propensity to achieve the aims of their espousal by impermissible means.

Another factor to be noted in considering world Communism is that the line dividing lawful speech from illegal incitement is evanescent and, as stated by Mr. Justice Jackson in *Harisiades v. Shaughnessy*, *supra*, "it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence" (342 U.S. at 592). A different

treatment of aliens with Communist affiliations as opposed to Americans with such affiliations is also supported by the fact that the latter can be expected to possess a greater degree of loyalty and allegiance to the United States than the former. Thus, while the *Aptheker* and *Robel* courts would not permit the conclusion that an American citizen automatically becomes a potential public risk by virtue of his mere affiliation with the Communist Party, such a conclusion is valid when applied to an alien who does not possess the same tie to and the same interest in the nation as an American. In short, Congress, in enacting subsection (a)(28), had a right in the exercise of its legislative judgment to recognize the difference between a member of the Communist Party who is already an American and a member of the Communist movement who as an alien seeks entry. It had a right to decide that the risk of potential illegal exploitation and subversive activities is much greater in the latter than the former.

Consequently, I cannot agree that the absence of absolute precision in the statutory regulation of the potential dangers of illegal advocacy and subversion by a certain class of aliens is fatal to the instant enactment. Rather, in view of the substantial national interest at stake, the limited nature of the burden on free speech, and the unavailability of meaningful alternatives, I conclude that the exclusion provisions do not cut more deeply into the freedom of speech "than is necessary to deal with 'the substantive evils that Congress has a right to prevent'" (*Scales v. United States*, *supra*, at 229) and, further, that these provisions are wholly outside the power of this court to control (*Harisiades v. Shaughnessy*, *supra*, at 531). In the hierarchy of priorities the imperative of na-

tional security in dealing with aliens must prevail over limited restrictions upon First Amendment rights.

FOREIGN AFFAIRS

Quite apart from protecting the paramount interest of national security, subsection (a) (28) can be amply justified as a tool for the flexible conduct of our foreign affairs. To prevent the priority of First Amendment rights in domestic or internal affairs from distorting our vision as to the vital importance of freedom in the conduct of our foreign affairs, it is necessary to emphasize the distinction. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936), the Supreme Court reminds us of this difference in its statement that

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted."

The exclusion power of a sovereign nation is one of the most important instruments in its arsenal for the independent conduct of its foreign affairs. Early appreciation of the close relationship between foreign affairs and immigration policy appears in Mr. Justice Gray's assertion that the power of exclusion was "vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). It is a truism that the Federal Government, representing as it does all the States, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign govern-

ments and that the regulation of aliens is intimately blended and intertwined with the responsibilities of the Federal Government in this field. *Hines v. Davidowitz*, 312 U.S. 52 (1941). See *Harrisades v. Shaughnessy*, *supra*, at pp. 588-589; *United States v. Curtiss-Wright Export Corp.*, *supra*, at 318; *United States v. Pizzarusso*, 388 F. 2d 8, 9 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 Penn. L. Rev. 903, 917-922 (1959). History has shown that this country, like other nations, has over the years enacted numerous laws and entered into many treaties to attain its foreign policy objectives including the guarantee of rights to the aliens of those countries which grant similar rights to American nationals.³

The loss of thousands of lives and the expenditure of billions of dollars attest to the fact that the Federal Government has reached the judgment that the continued world-wide growth of the world Communist movement as practiced in its tyrannical form is inimical to the best interests of this nation. In a great measure the world-wide struggle against Communism involves a struggle for the allegiance of persons. That is one reason this country warmly welcomes and grants

³ 28 U.S.C. § 2502 provides that the Court of Claims shall be open to the subjects or citizens of any foreign government which accords to the citizens of the United States the right to prosecute claims against their government in its courts. 22 U.S.C. § 256 grants jurisdiction to foreign consuls over their seamen only where such consuls' government grants the same rights to the United States consul by treaty. 8 U.S.C. § 1253(g) empowers the Secretary of State to instruct consular officers to discontinue the issuance of immigrant visas to nationals, citizens, subjects or residents of countries that refuse to accept deportees.

asylum to defectors from this totalitarian rule from many parts of the world. Another technique for resisting this world-wide movement is to bar admission to this country, even on a temporary basis, of aliens who aid and abet its growth by membership in its organizations in other countries and by espousing its doctrine abroad. In *Zemel* the Supreme Court sustained passport restrictions on travel to Cuba predicated primarily upon the government's judgment that a major goal of the Castro regime is to export its Communist revolution to the rest of Latin America, and that travel between Cuba and the other countries of the Western Hemisphere is an important element in the spreading of subversion (381 U.S. at 14-15). I see little difference in principle between this effort to physically isolate Communist Cuba and the effort to isolate the more general world-wide Communist movement by taking measures to dissuade potential adherents in various nations from supporting such movements.

Once it is understood that world Communism is not solely a doctrine but also a movement cutting across national lines, classifications, such as those set forth in subsection (a)(28), on the basis of adherence to that movement become understandable and justifiable. Obviously, it is in the national interest of the United States to provide its citizens with the greatest freedom of world-wide movement. However, whether a United States citizen may enter a particular country is determined by the government of the country to which entry is sought. Many of these countries are avowedly Communist or, at least, are strongly, if not decisively, influenced by the leaders of world Communism. To induce governments of such countries to adopt the reciprocal position of permitting the entry into, and freedom of speech of Americans in those

countries for similar privileges extended to aliens, the government should have the power to exclude members of world Communism as a matter of foreign policy. This power must be entrusted to the Legislative and the Executive branches of the government and not to the courts. The following statement of Mr. Justice Jackson in *Harisiades v. Shaughnessy*, *supra*, is illustrative of the principle:

"However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treatymaking powers." (342 U.S. at 591).

Reverting to the analogy of restrictions on the rights of American citizens to travel to certain Communist countries, the court in *Worthy v. Hepter*, 270 F. 2d 905, 910 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959), expressly noted that such a restriction is "in and of itself a foreign policy," or "at least, an instrument of foreign policy," citing individual examples of restrictions on travel to various countries until those countries released certain Americans who had been imprisoned there. Manifestly, the same holds true for the exclusion of Communist aliens from our country.

The relation between the exclusion power and the conduct of foreign affairs demonstrates why the rationale of *Robel* and *Aptheker* is inapposite to the instant case. For example, in *Robel* a more limited statute containing classifications regulating the employment of Communist Party members in defense

plants might have been drafted without any objective loss to national security. But to impose a classification limitation upon the exclusion power of Congress or the discretion of the Executive to exclude or admit members of those classes would necessarily restrict, emasculate and dilute the power of the Federal Government to deal in foreign affairs with other governments or their citizens. To validate subsection (a)(28) it is not necessary to conclude that the power to exclude is absolute although the national interest in survival among nations suggests that it must be. Since subsection (a)(28) is a limited exercise of that power amply justified by the interest of national security and the exercise by the Legislative and Executive branches of the Government of their foreign relations power, I conclude that its enactment is constitutional and that any effect upon First Amendment rights of American citizens to hear aliens (if they have such a right) is only incidental and necessary to accomplish the purpose sought to be achieved.⁴

FIRST AMENDMENT DUE PROCESS

The majority assert that while the Executive discretion to admit temporarily those whom the statute declares ineligible may exist in those cases where the exercise of that discretion does not impinge on First Amendment rights, such discretion cannot exist where, as here, such rights are affected. It is argued that no provision is made in the statute to assure that the exercise of the Executive discretion is subject to the

⁴ Once it is determined that this statute does not on its face violate the First Amendment, it is irrelevant that some legislators might have voted for it with the motive of excluding unpopular political doctrine. *United States v. O'Brien*, 391 U.S. 367, 382-386 (1968).

protection of due process. However, it is admitted that ultimately due process is not an issue since the Government is without any power to act under subsection (a) (28). Inasmuch as I reach the opposite conclusion that the Government has power to act in the area of subsection (a) (28), it is necessary to make a brief reference to the due process claim. The essence of plaintiffs' claim is that the procedure adopted by the Government violates First Amendment due process for only a judicial determination, for which there is no provision in the statute, suffices to impose a valid final restraint upon First Amendment rights, citing, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), and *Carroll v. President, and Commissioners of Princess Anne*, 393 U.S. 175 (1968). These cases are inapposite to the necessity for review in the factual context here at issue. They focused upon the procedure which resulted in an initial decision suppressing expression in the United States by Americans without prior judicial participation or hearing. In essence, the court held in those cases that where judicial decision making is ultimately required, it must be imposed sooner rather than later in an adversary rather than in an *ex parte* proceeding. There is no basis to extend the application of these cases to require judicial review wherever an administrative decision may have the incidental effect of somewhat hindering an American's right to hear an excluded alien.

The attack here must in reality be focused upon the initial decision by the American Consul, without judicial participation, upon the question of eligibility; it can hardly be directed at the exercise by the Executive of the waiver power, although there are many references made by the plaintiffs to the arbitrary action of the Attorney General. Under the statute the waiver

power can be exercised only after the American Consul reaches a final determination of ineligibility. This determination to waive or not to waive ineligibility is based on considerations extrinsic to the eligibility provisions of the statute which have been passed upon by the Consul and is peculiarly concerned with the political conduct of the government. Accordingly, there is little doubt that the option must be entrusted exclusively to the Executive branch of the Government without judicial interference. *Cf. Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States ex rel. Knauff v. Shaughnessy, supra*.

A similar conclusion must be reached with respect to the absence of judicial review of the American Consul's decision upon the question of eligibility but for a different reason. While an alien who has entered this country may be expelled only after procedural due process, an alien on the threshold of initial entry stands on an entirely different footing. As said in *United States ex rel. Knauff v. Shaughnessy, supra*, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (338 U.S. at 544). *Nishimura Ektu v. United States*, 142 U.S. 651 (1892); *Ludecke v. Watkins*, 335 U.S. 160 (1947). The requirement that aliens secure a visa from an American Consul abroad was first adopted as a security measure in 1917. Since that time statutory enactments, administrative interpretations and court decisions have uniformly held that the exercise of the Consul's determination was beyond judicial interference. "Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vise a passport may be ground for diplomatic complaint by the nation whose subject

has been discriminated against. See 3 Moore's Digest, 996. It is beyond the jurisdiction of the court." *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928). More recently, the Ninth Circuit Court of Appeals has reminded us that "Congress has conferred upon consular officers authority to issue or withhold a visa. Such determination is not subject to either administrative or judicial review." *Loza-Bedoya v. Immigration and Naturalization Service*, 410 F.2d 343, 347 (9th Cir. 1969); *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929), *cert. denied*, *United States ex rel. Ulrich v. Stimson*, 279 U.S. 868 (1929); *Licea-Gomez v. Pilliod*, 193 F.Supp. 577, 582 (N.D. Ill. 1960); *United States ex rel. Santarelli v. Hughes*, 116 F.2d 613, 615 (3d Cir. 1940); *Estrada v. Ahrens*, 296 F.2d 690, 692, n. 2 (5th Cir. 1961); *cf. Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895); *Brownell v. Tom We Shung*, 352 U.S. 180, 184, n. 3 (1956). See generally Rosenfield, *Consular Nonreviewability*, 41 A.B.A.J. 1109 (1955). In the area of alien exclusion the case for non-judicial review is particularly strong. Flexibility must be granted to the Consul under all sections of the Act in order to adapt the Congressional policy to the variable conditions with which the Consul is from time to time confronted. Frequently his decision to deny a visa is predicated upon confidential information, the disclosure of the sources of which might endanger the public security and in some cases might seriously adversely affect our foreign relations. See Auerbach, *The Visa Process and Review of Visa Application*, 37 Int. Rel. 305, 309 (1960), and *The Administration of the Immigration*

Laws by the Department of State and the Foreign Service, 36 Int. Rel. 6, 8 (1959).⁵

American citizens who desire to hear an excluded alien cannot, it seems to me for reasons of national security and in the interest of the proper conduct of our foreign affairs, demand a judicial review of the alien's exclusion. This is particularly true when it is realized that the alien himself has no such right. See *United States ex rel. Turner v. Williams*, *supra*, at 292.

For the above reasons I conclude that the above subsections are valid and constitutional, and that the complaint herein should be dismissed.

⁵ As a practical problem it should be noted that the requirement of judicial review would present a task of enormous magnitude for the court since, in order to guard against arbitrary visa refusals, it would be necessary to provide a review for all visa refusals regardless of the asserted ground for such refusal. (See 1969 Report of Visa Office of the United States Department of State for precise figures.) To suggest that the problem of rectifying errors would be simple upon the thesis that a review would necessarily be limited to remedying obvious or egregious errors, is unrealistic. It cannot be assumed that arbitrary actions "leap from the record" (*cf.* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1969)), especially where the factual background of the case is set in foreign lands having unfamiliar laws, customs and institutions. *Cf.* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale Law Journal 517, 567 (1966).

United States District Court, Eastern District of
New York

70 Civ. 344

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY AND RICHARD A. FALK, PLAINTIFFS

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, WILLIAM P. ROGERS, SECRETARY OF STATE, DEFENDANTS

Order

The above captioned cause having been duly referred to this statutory Court pursuant to an order of Hon. J. Edward Lumbard, Chief Judge of the United States Court of Appeals, Second Circuit, and said cause having duly come on to be heard before us on June 24, 1970, and upon filing the opinion of this Court dated March 18, 1971, it is

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for a preliminary injunction and declaratory judgment is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants are hereby enjoined and restrained from implementing and enforcing §§ 212(a)(28) and 212(d)(3)(A) of the Immigration & Nationality Act of 1952, 8 U.S.C. § 1182a(28) and (d)(3)(A) so as to deny plaintiff Mandel admission to the United States as a non-immigrant visitor, and it is further

ORDERED, ADJUDGED AND DECREED that the above specified sections of the Immigration & Nationality Act of 1952 are invalid and void insofar as they have been or may be invoked by the defendants to find plaintiff Mandel ineligible for a non-immigrant

visa and to deny him temporary admission into the United States, and it is further

ORDERED, ADJUDGED AND DECREED that upon proper application by the plaintiff Mandel for a non-immigrant visa and for admission to the United States for purposes similar to those involved in his prior applications, which were the subject matter of this action, the defendants are directed to issue him a non-immigrant visa and to permit his admission into the United States, and it is further

ORDERED, that the effectiveness of the second decretal paragraph hereof is stayed for twenty days from the date hereof.

Dated: New York, New York, April 13, 1971.

WILFRED FEINBERG,

U.S.C.J.

JOHN F. DOOLING, Jr.,

U.S.D.J.

DGT:LHB:ST

File No. 700345

United States District Court, Eastern District of
New York

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK, PLAINTIFFS

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, WILLIAM P. ROGERS, SECRETARY OF STATE, DEFENDANTS

NOTICE OF APPEAL

70 C 344

PLEASE TAKE NOTICE that the defendants hereby appeal to the Supreme Court of the United States from the order of the three-judge court herein dated April 13, 1971, and from each and every part of said order.

Dated: Brooklyn, New York, May 3, 1971.

EDWARD R. NEAHER,
*United States Attorney,
Eastern District of New York,
Attorney for Defendants,
Brooklyn, N.Y.*

By: LLOYD H. BAKER,
Assistant United States Attorney.

To: Clerk, United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201; Rabinowitz, Boudin & Standard, Esqs., Attorneys for Plaintiffs, 30 East 42 Street, New York, New York 10017.

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Supreme Court of the United States

October Term, 1971

No. 71-16

JOHN M. MITCHELL, Attorney General of the United States,
WILLIAM P. ROGERS, Secretary of State,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY
LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEIL-
BRONER, ROBERT PAUL WOLFF, LOUIS MENASHE,
NOAM CHOMSKY, and RICHARD A. FALK,

Appellees.

On Appeal from the United States District
Court for the Eastern District of New York

MOTION TO AFFIRM

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INDEX

	Page
Statement of the Case	2
Preliminary Statement	2
Facts	4
Argument	11,
Conclusion	24

Citations

ACLU v. Radford, 315 F. Supp. 893 (E.D.Va. 1970)	12
Aptheker v. Secretary of State, 378 U.S. 500	12, 16, 19
Baggett v. Bullitt, 377 U.S. 360	11
Barenblatt v. United States, 360 U.S. 109	22
Barlow v. Collins, 397 U.S. 159	14
Boutilier v. INS, 387 U.S. 118	20, 21
Brandenburg v. Ohio, 395 U.S. 444	12
Bridges v. Wixon, 326 U.S. 135	15, 21

Cases (Continued):	Page
Brooks v. Auburn University, 412 F.2d/1171 (5th Cir. 1969)	12
The Chinese Exclusion Case, 130 U.S. 581	16, 21
Cohen v. California, ___ U.S. ___, 91 S. Ct. 1780	13
Data Processing Service v. Camp, 397 U.S. 150	14
Dennis v. United States, 341 U.S. 494	21
Fong Yue Ting v. United States, 149 U.S. 698	15
Galvan v. Press 347 U.S. 522	22
Gegion v. Uhl, 239 U.S. 3	16
Goldberg v. Kelly, 397 U.S. 254	14
Harisiades v. Shaughnessy, 342 U.S. 580	15, 21, 22
Griswold v. Connecticut, 381 U.S. 479	11
Investment Co. Institute v. Camp, 401 U.S. 617	14
Kennedy v. Mendoza-Martinez, 372 U.S. 144	12
Kent v. Dulles, 357 U.S. 116	12, 14, 19, 23
Keyishian v. Board of Regents, 385 U.S. 589	11
Knauff v. Shaughnessy, 338 U.S. 537	20, 21, 22
Lamont v. Postmaster General, 381 U.S. 301	11, 12, 13, 16, 17

Cases (Continued):	Page
Martin v. City of Struthers, 319 U.S. 141	11
Massignani v. INS, 438 F.2d 1276 (7th Cir. 1971)	15
Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970)	12
NAACP v. Button, 371 U.S. 415	16
Nishimura Ekiu v. United States, 142 U.S. 651	21
O'Callahan v. Parker, 395 U.S. 258	12
Pickings v. Bruce, 430 F.2d 595 (6th Cir. 1970)	12
New York Times Co. v. United States, — U.S. —, 39 U.S.L.W. 4879	11, 12, 17, 18
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367	11
Rowan v. Post Office Dept., 397 U.S. 728	17
Schneider v. Smith, 390 U.S. 17	19
Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955)	20
Shelton v. Tucker, 364 U.S. 479	11
Shuttlesworth v. Birmingham, 394 U.S. 147	13

Cases (Continued):	21
Smith v. University of Tennessee 300 F. Supp. 777 (E.D. Tenn. 1969)	12
Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968)	12
Speiser v. Randall, 357 U.S. 513	12, 13
Stanley v. Georgia, 394 U.S. 557	11
Sweezy v. New Hampshire, 354 U.S. 234	11, 14
Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), <i>cert. den.</i> 394 U.S. 977	13
Thornhill v. Alabama, 310 U.S. 88	14
Turner v. Williams, 194 U.S. 279	20, 21, 22
United States v. Hiatt, 415 F.2d 664 (5th Cir. 1970), <i>cert. den.</i> 397 U.S. 936	17
United States v. Laub, 385 U.S. 475	23
United States v. O'Brien, 391 U.S. 367	12, 13
United States v. Robel, 389 U.S. 258	12, 16, 18, 19, 20
Williams v. Blount, 314 F. Supp. 1356 (D.D.C. 1970)	17
Youngstown Co. v. Sawyer, 343 U.S. 579	12
Zemel v. Rusk, 381 U.S. 1	13, 20, 21, 22, 23

Constitutional Provisions

First Amendment	3, 4, 8, 10, 11, 12, 14, 15, 19, 20, 21, 22, 24
Fifth Amendment	8, 12

Statutes and Regulations:

Immigration and Nationality Act of 1952

8 U.S.C. § 1101(a)(15)	2
Section 212(a)(28)(D), 8 U.S.C. § 1182 (a)(28)(D)	2, 3, 5, 8, 9, 10
Section 212(a)(28)(G)(v), 8 U.S.C. § 1182(a)(28)(G)(v)	2, 3, 8, 9, 10
8 U.S.C. § 1201	2
8 U.S.C. § 1202	2
8 C.F.R. § 212.1	2
8 C.F.R. § 212.4	2
8 C.F.R. § 214.1	2

Miscellaneous:

<i>Belgian Left Socialist Weekly</i>	9
Comment, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 141 (1970)	14
Hearings Before the President's Commission on Immigration and Naturalization, 82nd Cong., 2d Sess. 408	14
Heisenberg, <i>Physics and Beyond, Encounters and Conversations</i> (1971)	14
Mandel, <i>Marxist Economic Theory</i> (1969)	4, 9

Supreme Court of the United States

October Term, 1971

No. 71-16

JOHN M. MITCHELL, Attorney General of the United States,
WILLIAM P. ROGERS, Secretary of State,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY
LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEIL-
BRONER, ROBERT PAUL WOLFF, LOUIS MENASHE,
NOAM CHOMSKY, and RICHARD A. FALK,

Appellees.

On Appeal from the United States District
Court for the Eastern District of New York

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the three-judge District Court be affirmed on the ground that it is so firmly supported by prior decisions of this Court regarding the freedom of American citizens to engage in public and academic debate and inquiry that no substantial question remains or has been presented by appellants to warrant further argument in this Court.

STATEMENT OF THE CASE

Preliminary Statement

The political exclusion provisions of the McCarran Act,¹ authorize the Attorney General and Secretary of State to screen the admission of a class of aliens indentified only by their political and economic beliefs. The process is initiated under Section 212(a)(28)(D) and (G)(v) by the Secretary of State, who is required to disqualify an alien from receiving a non-immigrant visa, without which he cannot enter the United States, if it is found that the alien has at any time advocated or taught the "economic, international, and governmental doctrines of world communism," or written, published, circulated, distributed or displayed literature advocating or teaching such doctrines. Section 212(d)(3)(A) authorizes the Attorney General, acting upon a favorable recommendation from the Department of State, to waive the political ineligibility of any alien in this class or to deny such waiver and exclude the alien.²

In this case, numerous American scholars and students have extended invitations to Dr. Ernest Mandel, a citizen and resident of Belgium, seeking his participation in academic meetings at various universities and other public forums in the United States. But since 1969, the Attorney General has consistently refused to waive Dr. Mandel's political ineligibility for a nonimmigrant visa and consequently he has been unable to fulfill these engagements.

1. This reference is limited to Sections 212(a)(28)(D) and (G)(v), 212(d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§1182(a)(28)(D) and (G)(v), 1182(d)(3)(A).

2. The various classes of nonimmigrant aliens are described by 8 U.S.C. §§1101(a)(15) in terms of the purpose for which the alien seeks entry into this country. General requirements for obtaining a nonimmigrant visa are set forth in 8 U.S.C. §§1201 and 1202. Procedures governing the making and submission of applications for nonimmigrant visas and for waivers of ineligibility have been promulgated by the Secretary of State and are set forth in 8 C.F.R. §§ 212.1, .4; 214.1.

That refusal is not based on any claim that Dr. Mandel has subversive affiliations, that his presence in this country endangers national security, that his exclusion is dictated by actual foreign policy considerations, or, indeed, that any valid Government interest is involved. In fact, no independent reason appears in the record or has been asserted by the Attorney General as the basis for his actions. Rather the Attorney General states that he merely exercised his statutory, if not inherent, "discretion" to deny a waiver of ineligibility and thereby consign Dr. Mandel to the class of aliens excludable solely because of their disfavored political philosophy, under § 212(a)(28)(D) and (G)(v).

This suit was brought by a group of American scholars, who had invited Dr. Mandel here for academic discussions and who assert a First Amendment right to do so. This right was sustained by the court below explicitly on the finding that appellants had failed to demonstrate any specific valid governmental interest that is furthered by preventing citizens from meeting with Dr. Mandel in this country. The court concluded that the effect, if not the purpose, of excluding Dr. Mandel without any legitimate reason, was to apply the political exclusion provisions of the McCarran Act as a system for censoring information and ideas that citizens have a right to receive.

On this appeal, appellants do not deny that they are constitutionally forbidden to exercise their exclusion power as a means of censoring freedom of citizens to engage in academic and political discussion. But appellants contend that even where, as here, citizens are arbitrarily denied that freedom, there is no remedy in court. Dr. Mandel's exclusion, whatever its basis and despite its impact on First Amendment rights, according to appellants, is an exercise of the sovereign power to conduct foreign relations and maintain national security, and therefore beyond the scope of judicial inquiry.

On the basis of the factual record, which appellants concede is not in dispute, and after careful consideration of the decisions of this Court and the basic historical data relating to

the purposes underlying the First Amendment, the court below rejected appellants' claim of absolute power. This appeal raises only one question: whether the federal courts are powerless to review and redress a deprivation of the First Amendment rights of American citizens to engage in discussions with an alien scholar at academic meetings in this country, where such meetings have been prevented by virtue of appellants' decision to exclude the alien for no other reason than the undesirability of his intellectual philosophies.

The Facts

This case was commenced by persons, who, except for Dr. Mandel, are all citizens and residents of the United States. Each of these citizens is a member of the faculty at a major American university and is engaged in scholarly work in one or several fields of the social sciences. Each has attained prominence in the academic community, in some instances as Chairman of his department; some have achieved world-wide recognition for their academic endeavors.

For many years these appellees and many other American scholars and students have sought Dr. Mandel's participation in lectures, debates, seminars and similar academic programs at their universities and at other public forums in this country. Their interest in Dr. Mandel stems from the fact that he is an internationally known scholar, economist and journalist, and a noted authority on and exponent of Marxist economic theory. His two volume text entitled *Marxist Economic Theory*, published in 1969, has been acclaimed the major, contemporary work in its field.

In 1968, Dr. Mandel received a number of specific invitations from members of the American academic community. He accepted many of these and during a period which extended from early September to November, 1968, he fulfilled speaking and debating engagements at more than 30 universities in the United States and Canada, including Harvard, Swarthmore, Antioch, Michigan, Notre Dame and Berkley.

Similar invitations were received in 1969; one, from Stanford University, which Dr. Mandel accepted, sought his participation in a two-day conference, October 17, and 18, 1969, on "Technology and the Third World" as a speaker and as a panelist to discuss a speech to be given by Professor John Kenneth Galbraith of Harvard.

On September 8, 1969, Dr. Mandel applied to the American Consulate in Brussels for a nonimmigrant, temporary visa, as he had done in connection with his speaking tour the previous year. The application sought permission to enter and remain in the United States for six days from October 14 through October 20 for the sole purpose of attending the Stanford Conference.³

Appellants denied the visa application without prior notice to Dr. Mandel or anyone concerned with the Stanford Conference. In fact, no word of appellants' action was conveyed to anyone until five days after the conference and purpose of the visit had ended, at which time Dr. Mandel was orally advised by the American Consulate in Brussels of the denial.

The advice was confirmed in the Consul's letter of October 30, 1969 to Dr. Mandel.⁴ The Consul explained that Dr. Mandel had been found ineligible, in 1962, to receive a nonimmigrant visa under the political exclusion provisions of the McCarran Act.⁵ According to the Consul, Dr. Mandel's admissions to the United States in 1962, as a working journalist, and in 1968, for his speaking tour, were based on waivers of ineligibility granted by the Attorney General upon favorable recommendations from

3. The six-day request was made so that Dr. Mandel would have the personal convenience of two days' travel time before and after the conference.

4. Exhibit H to the affidavit of Leonard B. Boudin submitted in support of the motion for a preliminary injunction.

5. Annexed to the letter was a three page copy of §§212(a)(28) and 212(d)(3)(A) of the McCarran Act. But the Consul did not specify under which provision the ineligibility finding was made. Nor did the Consul indicate that this finding had ever been the subject of review since 1962.

the Department of State. The Consul specifically acknowledged, however, that Dr. Mandel had not been "clearly informed, in 1962, of the refusal and subsequent discretionary procedure being followed," but closed by stating without further explanation that the Department of State had refused to recommend the granting of a waiver in connection with his recent application.

On October 22, 1969, prior to having been advised as to the disposition of his September application, Dr. Mandel submitted a new application. This application sought admission to the United States for the period from early November to December, 1969, specifically for the purpose of fulfilling invitations to speak and lecture at (i) several universities, including Princeton, Amherst, The New School, Columbia and Vassar, (ii) at a student sponsored conference at the Massachusetts Institute of Technology, and (iii) at a conference arranged jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference at Town Hall in New York City.

The summary denial of the September application triggered concern among the appellees and other citizens, who had invited or had intended to take part in discussions with Dr. Mandel, that the October application would receive similar treatment. Appellees' attorney, among others, sought an explanation from the Department of State for the denial of the September application and an assurance that the October application would be granted.

In response, the Administrator of the Bureau of Security and Consular Affairs advised appellees' attorney on November 6, 1969 that the Department of State's decision not to recommend waiver of ineligibility was premised on its belief that in 1968 Dr. Mandel had violated the conditions attached to the waiver he had been granted by "engag[ing] in activities beyond the stated purposes of his trip."⁶ But, as the Administrator

6. Exhibit J to the affidavit of Leonard B. Boudin submitted in support of the motion for preliminary injunction.

stated, after further review it was the Department's conclusion "that in 1962 and 1968 Dr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and his assurances, given in connection with his current [October] application, that he will conform to his stated itinerary and purposes, we are reconsidering his case and are discussing it with the Department of Justice."

Despite repeated requests during November and December, 1969, for further information on the status of Dr. Mandel's visa application, no word was received until January 27, 1970, when the Bertrand Russell Foundation was advised by the Department of State that "... in the interest of free expression of opinion and exchange of ideas we recommended a waiver for Dr. Mandel. The Immigration and Naturalization Service (acting for the Attorney General) responded that a waiver was not warranted."⁷

In reply to similar requests, a representative of the Immigration and Naturalization Service (INS) advised appellees' attorney on February 13, 1970, that since 1962 Dr. Mandel has been deemed ineligible for a visa "because of his subversive affiliations" and that based on his activities during his entry in 1968, which "went far beyond the stated purposes of his trip ... and represented a flagrant abuse of the opportunities afforded him to express his views in this country ... it was concluded that the favorable exercise of discretionary authority provided under the Immigration and Nationality Act was not warranted."⁸ Without referring to the findings of the Department of State, which contradicted those underlying the deter-

7. Exhibit M to the affidavit of Leonard B. Boudin submitted in support of a motion for a preliminary injunction.

8. Exhibit P to the affidavit of Leonard B. Boudin submitted in support of a motion for a preliminary injunction.

mination of the INS, the letter closed with the statement that "[t]here was no basis for changing this determination."⁹

By their complaint filed on March 19, 1970, appellees sought to enjoin further enforcement against Dr. Mandel of the political exclusion provisions, principally on the grounds that the application of those provisions in this case violated the First Amendment right of the American appellees to hear Dr. Mandel and to engage in free and open academic debate and inquiry with him.¹⁰

Appellants' position can best be described by first stating what their position was and is not. Appellants recognize the fact that the invitations which have been sent to Dr. Mandel by appellees and other American scholars and students were made in good faith and sought his participation in genuine academic programs. It is also recognized that Dr. Mandel is qualified in all

9. The INS letter did not explain why two prior letters requesting information sent by appellees' attorney had not been answered or why no response was received until so long after the period of Dr. Mandel's proposed visit had ended. Nor was there any explanation in the INS letter for the fact that the determination to refuse to waive ineligibility was not made by the Attorney General as §1182(d)(3)(A) requires, but by an employee of the INS "acting for the Attorney General." See *supra*, p. 2.

10. In addition to challenging on First and Fifth Amendment grounds, the validity of the political exclusion provisions on their face and as applied, appellees also sought to restrain their enforcement against Dr. Mandel, because (i) the terminology of §212(a)(28)(D) and (G)(v) was so vague and overbroad and the discretionary power delegated to the Attorney General by §212(d)(3)(A), so unlimited, that these provisions invested appellants with unfettered power to prevent Americans from hearing any expression of political, social, economic or other intellectual opinion which has not obtained Government approval; (ii) the provisions operate to bar expression of opinions relating only to one side of the spectrum of political philosophies; (iii) the provisions fail to provide adequate, or indeed, any procedural safeguards and ascertainable standards; and (iv) there is not a scintilla of evidence to support the findings underlying the Attorney General's refusal to accept the Secretary of State's favorable waiver recommendation.

respects for a nonimmigrant visa, and is deemed ineligible to receive such a visa solely by virtue of the political exclusion provisions of the McCarran Act.

Appellants also concede, contrary to the assertion in the February 13, 1970 INS letter, that Dr. Mandel's ineligibility is not based on a claim that he is a member of the Communist Party or its affiliates, nor indeed, on any claim of "subversive affiliations." Dr. Mandel's ineligibility is based instead solely and explicitly on his writings (or more accurately the title of his book, *Marxist Economic Theory*) and the fact that he is the editor of "the Belgian Left Socialist Weekly," and therefore, appellants contend, he falls within the class of aliens delineated by § 212(a)(28)(D) and (G)(v). (Juris. State. p. 4.)¹¹

Furthermore, appellants eschew here, as in the court below, any reliance on Dr. Mandel's alleged violation of the conditions placed on his visa in 1968. In their affidavit opposing the convening of a three-judge court, appellants asserted that the question of whether or not such a violation had occurred is "irrelevant" and therefore produced no evidence on this point. Nor, for that matter, do appellants claim that Dr. Mandel was excluded as a form of diplomatic reprisal against Belgium or because of strained relations with that country or because Belgium has arbitrarily excluded Americans or because Dr. Mandel's presence in this country would endanger national security. Aside from the mere assertion that Dr. Mandel was excluded in the exercise of appellants' powers over foreign affairs and national security, no specific interest relating to these powers has been identified by appellants as the reason for the action they have taken.

In short, as the court below found, appellants' position is simply that with respect to aliens who fall within the class

11. "Juris. State." refers to the Jurisdictional Statement filed by the Solicitor General on behalf of appellants; "a" refers to the appendix to the Jurisdictional Statement.

delineated by Section 212(a)(28)(D) and (G)(v) "the Attorney General is not required to have factual support for or to justify his discretionary decision not to grant temporary admission since the power to exclude is absolute and waiver of exclusion purely a matter of grace." (8a)

The majority below rejected the existence of such absolute and unfettered power where its exercise entrenched upon First Amendment rights. "[T]he First Amendment peremptorily forbids equating the implied power to exclude aliens in the interest of national security and the even conduct of international affairs with a power to abridge the freedom of speech, press and peaceable assembly." (26a). Even if the political exclusion provisions of the McCarran Act were genuinely enacted for the purpose of protecting national security, the court concluded that the reach of these provisions was so indiscriminate that they can be employed, as in this case, "as a means of restraining the entry of disfavored political doctrine." (11a). As the court further stated:

"The prevention of the teaching and advocacy that is not incitement or conspiracy to initiate presently programmed violence is not in any degree a legitimate legislative objective . . . It is forbidden in ultimate analysis, because the public interest—expressed in the First Amendment—requires that the citizens as sovereign have access to, evaluate and accept or reject that teaching as well as every other teaching or advocacy." (24a)

Finding that appellants had not even suggested that Dr. Mandel's exclusion served any legitimate government interest, whether in the realm of national security, foreign relations or otherwise, the court declared that "[t]he challenged parts of the Act as here applied . . . do not reflect a genuine exercise of the implied power of alien exclusion." (26a)

Having determined that the political exclusion provisions, as applied, violated the First Amendment, the court entered a

judgment, from which this appeal arises, enjoining appellants from "implementing and enforcing §§212(a)(28) and 212(d)(3)(A) . . . so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor." (60a)

Although District Judge Bartels, in dissent, argues that the political exclusion provisions are valid because they can be invoked to serve "important objectives of (1) national security and (2) foreign policy" (36a) he, like appellants, does not contend that any of these interests were in fact served by preventing American citizens from meeting with Dr. Mandel for academic discussions in this country.

ARGUMENT

The decision below is dictated by the rulings of this Court.

The freedom of American citizens to receive information and ideas is "fundamental to our free society"¹² and its protection is "nowhere more vital" than in the present context of academic inquiry and debate.¹³ The decision below rests on the basic premise of our constitutional form of government, that the First Amendment is not a grant of rights to citizens, but rather an affirmation of "the total retention by the people as sovereign to themselves of the right to free and open debate of political questions. . . ." (22a). As the court further stated:

12. *Stanley v. Georgia*, 394 U.S. 557, 564; see also *New York Times Co. v. United States*, ____ U.S. ____, 39 U.S. Law Week 4879; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390; *Griswold v. Connecticut*, 381 U.S. 479, 482; *Lamont v. Postmaster General*, 381 U.S. 301, 307-308 (Mr. Justice Brennan concurring); *Martin v. City of Struthers*, 319 U.S. 141, 143.

13. *Shelton v. Tucker*, 364 U.S. 479, 487; see also *Keyishian v. Board of Regents*, 385 U.S. 589, 603; *Baggett v. Bullitt*, 377 U.S. 360; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 and at 262 (Mr. Justice Frankfurter concurring).

In numerous recent decisions, the right to hear has prevailed over university "speaker bans", which, like the McCarran Act provisions involved in this case, were employed to keep "alien" political philosophies.

"The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to have him explain and seek to defend his views; that as *Garrison* and *Red Lion* observe, is the essence of self-government." (22a-23a).

In this case the admission of Dr. Mandel is but a "lever" by which the First Amendment rights of American citizens can be given effect. (25a). While several provisions of the Constitution place this lever in appellants' hands, another provision, namely the First Amendment, clearly controls its use, as it does every other general executive and legislative power, to prevent the needless or intentional destruction of fundamental rights.¹⁴

Exclusion "for any reason," as appellants have said, forecloses the opportunity for any person to engage in discussions with aliens in this country. (Juris. State., p. 9) But, as appellants concede, they may not constitutionally exclude aliens for that reason or for that effect.¹⁵ Yet, this is precisely what has

out of college classrooms and lecture halls. See *Molpus v. Fortune*, 432 F.2d 916 (5th Cir. 1970); *Pickings v. Bruce*, 430 F.2d 595, 598-599 (6th Cir. 1970); *Brooks v. Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969); *ACLU v. Radford*, 315 F.Supp. 893 (E.D.Va. 1970); *Smith v. University of Tennessee*, 300 F.Supp. 777 (E.D.Tenn. 1969); *Snyder v. Board of Trustees*, 286 F.Supp. 927 (N.D.Ill. 1968).

14. This Court has enforced the First and Fifth Amendments in cases involving the assertion of government powers of the broadest dimensions, including the war power, see *United States v. O'Brien*, 391 U.S. 367; *United States v. Robel*, 389 U.S. 258; the power to maintain national security, *United States v. Robel*, *supra*; *Aptheker v. Secretary of State*, 378 U.S. 500, 508-509; the power to conduct foreign relations, *New York Times Co. v. United States*, *supra*; *Kent v. Dulles*, 357 U.S. 116, 125-130; see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-165; *O'Callahan v. Parker*, 395 U.S. 258, 273; *Youngstown Co. v. Sawyer*, 343 U.S. 579, 587.

15. See *Brandenburg v. Ohio*, 395 U.S. 444, 448-449; *Lamont v. Postmaster General*, *supra*; *Kent v. Dulles*, 357 U.S. 116; *Speiser v. Randall*, 357 U.S. 513, 527.

occurred here. Absent any claim of countervailing interest, Dr. Mandel's exclusion has the sole and selective effect, if not intended result, of preventing citizens from discussing ideas of which the Government does not approve.¹⁶

Moreover, the citizens appellees in this case do not assert the general public interest in hearing the views of aliens, but rather their own specific interest in the admission of Dr. Mandel. As the court below stated:

"Here the plaintiffs other than Mandel are directly involved with Mandel's entry because they have invited him, and they expect to participate in meetings with him, or expect to be among his auditors. No more is required to establish their standing. Cf. *Snyder v. Board of Trustees*, *supra*, 286 F. Supp. at 931-932; *Smith v. University of Tennessee*, E. D. Tenn. 1969, 300 F.

In this case issuance of a visa to Dr. Mandel is closely analogous to issuance of a license to speak in a public park. While the exercise of First Amendment rights depends on obtaining a government permit or license, it is firmly settled under decades of rulings by this Court, that the permit or license can not be withheld without legitimate reason and certainly not because the ideas sought to be expressed do not meet with Government approval. See *Cohen v. California*, ___ U.S. ___, 91 S. Ct. 1780, 1786; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151; see also *Teague v. Regional Commissioner of Customs*, 404 F.2d 441, 445 (2d Cir. 1968), *cert. denied* 394 U.S. 977.

16. By contrast in both *United States v. O'Brien*, *supra* at 381-382 and *Zemel v. Rusk*, 381 U.S. 1, 13 the Court sustained the applications of the challenged statutes involved, expressly because they were neither predicated on nor directed towards the control of speech, beliefs or associations protected by the First Amendment. See also *Teague v. Regional Commissioner of Customs*, *supra* at 445-446 (where minor restraints on the inflow of literature from Communist China were found not to violate the First Amendment since, in contrast to the application of the political exclusion provisions here, the Customs regulation in *Teague* involved "no inquiry into the content of the detained material," was not implemented to restrict "the flow of information or ideas" and was narrowly limited to achieving a "proper, important, and substantial" government objective). Here as in *Lamont v. Postmaster General*, *supra*; and *Speiser v. Randall*, *supra*, the thrust of the Government's action is aimed at curtailing the expression of ideas citizens have a right to hear.

Supp. 777, 780. The special relation of plaintiffs to Mandel's, projected visit gives them a specificity of interest in his admission, reinforced by the general public interest in the prevention of any stifling of political utterance, that abundantly satisfies 'standing' requirements." (23a).¹⁷

Appellants make a hollow attempt to minimize the effect of Dr. Mandel's exclusion. They suggest that interested citizens can read Dr. Mandel's books, and if they have anything to discuss with him, they can meet him outside the country. But, what citizens have lost by virtue of appellants' actions is the openness, spontaneity and responsiveness of face to face confrontations, which is the essence of academic debate.¹⁸ Just as this Court has found written submissions generally to be no substitute for oral argument, *Goldberg v. Kelly*, 397 U.S. 254, 289, so, too, the availability of Dr. Mandel's books in this country cannot replace his presence in a classroom or conference. The suggestion that Dr. Mandel's American audience can meet him outside the country is so obviously impractical as to require no further discussion, and is also quite improper since "no one is to have the exercise of his liberty of expression abridged in appropriate places on the plea that it may be exercised in some other place." *Thornhill v. Alabama*, 310 U.S. 88, 106.

Equally untenable is appellants' basic position that they have absolute power to exclude any alien, without cause or justification and regardless of the impact on First Amendment

17. Cf. *Investment Co. Institute v. Camp*, 401 U.S. 617; *Data Processing Service v. Camp*, 397 U.S. 150; *Barlow v. Collins*, 397 U.S. 159.

18. This Court has recognized that personal contacts with foreign scholars is invaluable to the growth and progress of American scholarship. *Kent v. Dulles*, *supra* at 126-127; see also *Sweezy v. New Hampshire*, *supra* at 250; Hearings Before the President's Commission on Immigration and Naturalization, 82nd Cong., 2d Sess. 408, 1464; Comment, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 141, 143-150 (1970); Heisenberg, *Physics and Beyond, Encounters and Conversations* (1971) (*passim*).

rights of citizens. Appellants argue that in spite of the fact that Dr. Mandel's exclusion serves no legitimate foreign or domestic interest and chokes off debate in which citizens have a right to engage, any application of the exclusion power is an exercise of sovereignty and hence unreviewable.

That argument was rejected by the court below on the basis of consistent rulings by this Court, which have resisted every attempt by Government officials to carve out spheres of operations that are exempt from judicial scrutiny and First Amendment limitations. This Court has made it perfectly clear that the First Amendment categorically forbids the exercise of any government power as a means of censoring what citizens are entitled to hear and debate, particularly in academic settings.

Both the unqualified terms and underlying purposes of the First Amendment bar any inference that there exists a special exception for the exclusion power. Nor does any decision of this Court recognize or imply that either the executive or legislative branches are endowed with supra-constitutional powers, sovereign or otherwise, by which they may override the powers delegated to the judicial branch or the rights reserved to the people.¹⁹ Indeed, the decisions of this Court, rendered over

19. Appellants' reliance on cases in which the exclusion power has been referred to as "inherent in sovereignty" (Juris. State., p. 9) does not avail their claim of absolute, unreviewable power. None of those cases involved a claim of First Amendment right by citizens, or by aliens who had standing to assert such rights.

In addition, it is significant that appellants' absolutist position has been rejected in alien expulsion cases, despite the fact that the powers to exclude and expel "rest upon one foundation, and are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Fong Yue Ting v. United States*, 149 U.S. 698, 712. This Court has clearly held that aliens in this country enjoy the protections of the First Amendment. See *Harisiades v. Shaughnessy*, 342 U.S. 580; *Bridges v. Wixon*, 326 U.S. 135, 148; see also *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971).

Moreover, this Court's references to the exclusion power as an element of sovereignty were made solely in the context of demonstrating that the

a period of several decades and involving the assertion of sovereign powers of the highest magnitude, firmly established the principle that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. 415, 438; see also *United States v. Robel*, *supra*; *Lamont v. Postmaster General* *supra*; *Aptheker v. Secretary of State*, *supra* at 508.

The absence of an asserted interest, compelling or otherwise, as justification for excluding Dr. Mandel, makes this case precisely like *Lamont v. Postmaster General*, *supra*. In both cases, Government officials exercised their conceded powers to censor and withhold information derived from foreign sources, which American citizens have a right to receive. In neither case is there evident a Government interest other than to prevent or

exclusion power is vested in the national government and in no manner shared with the States or subject to control by any foreign government. See *The Chinese Exclusion Case*, 130 U.S. 581, 604-605.

In *The Chinese Exclusion Case*, *supra*, this Court specifically ranked the exclusion power among other high powers of government, including the war power, all of which, it noted, were subject in their exercise to constitutional restrictions.

"The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself. . ." 130 U.S. at 604.

It was made equally clear that judicial review was available to determine whether the exercise of the exclusion or expulsion power bore at least a reasonable relation to the achievement of some legitimate public purpose. See 130 U.S. at 610-611.

This Court has never adopted or given any credence to the Government's position advanced in this case. Contrary to the appellants' view, this Court has never accepted a bare assertion of power as sufficient justification for its exercise. See *infra*, p. 15; cf. *Gegiow v. Uhl*, 239 U.S. 3, 9: That this has been true in cases involving the interests of aliens only, removes any doubt that the court below correctly exercised its jurisdiction to redress the deprivation of fundamental rights of citizens.

impede the communication of disfavored political doctrine. As the court below stated:

"The power to exclude aliens is not questioned: there is not here any distinct aim of the exercise of that power that is primary and to the attainment of which the restraint of First Amendment interests is sacrificed in a secondary or mediating exercise of power. Here the substance of the exercise of the power is the restraint on interests protected by the First Amendment."
(13a-14a).²⁰

Significantly, the Government in *Lamont* did not claim, as it has here, total exemption from judicial review with respect to the exercise of its powers over foreign commerce, the mails, foreign relations and national security.

If anything, the burden imposed on First Amendment rights in this case is far greater than in *Lamont*. In *Lamont*, the statute required the Postmaster General to forward the detained mail to an addressee immediately upon request. Under the statutory scheme in this case the appellants claim absolute discretion, not merely to delay, but to bar completely Dr. Mandel's admission. Nor does this case involve indiscriminate mailings, as in *Lamont*. Cf. *Rowan v. Post Office Dept.* 397 U.S. 728. Dr. Mandel has been specifically invited to speak by members of the American academic community and his audience will be composed exclusively of those who choose to hear him.

That the federal courts will not abdicate their role in enforcing the freedom of citizens to receive information and engage in academic inquiry, even when confronted by a claim of "sovereign prerogative" was also made unmistakably clear in this Court's most recent decision, *New York Times Co. v. United States*, ___ U.S. ___, 39 U.S. LW. 4879. In that case the

20. See also *United States v. Hiatt*, 415 F.2d 664 (5th Cir. 1970), cert. denied 397 U.S. 936; *Williams v. Blount*, 314 F. Supp. 1356 (D.D.C. 1970).

Government sought an injunction against publication by several newspapers of certain "Top Secret" classified documents. It asserted, as it does here, a "sovereign prerogative" over the conduct of foreign affairs and maintenance of national security. But unlike here, the Government in the *New York Times* case did not rest on a bare claim of absolute power. Quite the contrary, the Government fully recognized that even the strong inference of compelling interest that might arise from a "Top Secret" classification must be buttressed by an evidentiary showing that release of the documents would so directly, immediately and irreparable damage national interests that prior censorship of the papers was warranted. The Government attempted, but failed, to meet its burden in the *New York Times* case. It has not even made any attempt to do so here.

If in the ostensibly sensitive area of "Top Secret" documents affecting national security and foreign relations the First Amendment limits governmental actions, then its application is an *a fortiori* matter in this case, where no security interest is apparent and none is asserted. Indeed, in the *New York Times* case, every Justice of this Court wrote an opinion or concurred in one that would reject appellants' contention (Juris. State. p. 9) that "the decision to exclude and the grounds for admissibility are not matters for judicial inquiry." Plainly, as Mr. Justice Harlan said, "[c]onstitutional considerations forbid a complete abandonment of judicial control." Cf. *United States v. Reynolds*, 345 U.S. 1, 8 (1953). 39 U.S. L.W. at 4892-93. Even if Congress had enacted a law authorizing the Government to restrain the publication of secret information which would endanger national security or the effectuation of foreign policies, as Mr. Justice Stewart said, "the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved." 39 U.S.L.W. at 4884.

Again, the principle was stated without qualification in *United States v. Robel*, 389 U.S. 258, 264 that "[w]hen Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is

our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." Mr. Justice White in dissent expressed no difference of opinion with the majority on this point, although upon review he would have sustained the statute involved.

Robel presented a far more difficult test of the principle than does this case. The statute in *Robel* focused solely on membership in the Communist Party by employees of defense plants. The Government made the argument that Congress could punish such membership as an exercise of its war power in order to protect defense plants against sabotage. But this Court held that regardless of the power on which the statute is predicated, it still must meet the precision requirements of the First Amendment, and that measured against those requirements the statute was overbroad. "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" 389 U.S. at 263-264. See also *Schneider v. Smith*, 390 U.S. 17.

None of the elements which made *Robel* a difficult case are present here; Mandel is not a member of or affiliated with the Communist Party, his political beliefs and expressions are concededly lawful, his visit to this country of course does not involve the obviously sensitive area of defense plants or the possibility of sabotage, or indeed, any unlawful activity and the powers asserted here do not match the extraordinary dimensions of the war power. All that we have here is the "talismanic incantation" and a claim, not even made in *Robel*, that appellants' exercise of power is absolute and beyond judicial inquiry.

Similarly in *Kent v. Dulles*, 357 U.S. 116 and *Aptheker v. Secretary of State*, 378 U.S. 500 the Government unsuccessfully sought to defend the denial of passports to members of the Communist Party on the basis of the twin powers asserted here. But in both *Kent* and *Aptheker*, in striking contrast to this case, the government did not claim that the exercise of these powers was unreviewable. In fact, the Government conceded in

Kent, that the contention that issuance or denial of passports was "a purely political matter" had been correctly rejected in *Shachtman v. Dulles* 225 F.2d 938 (D.C. Cir. 1955).²¹ See also *Zemel v. Rusk*, 381 U.S. 1.

It is absurd for appellants to argue that by enforcing the First Amendment right of citizens to hear Dr. Mandel, in circumstances where no specific reason for his exclusion appears other than censorship of what he has to say, the decision below "transfers the power to decide what aliens may come into the United States to any citizen or group of citizens who might claim that they would like to confront the alien in person." (Juris. State. p. 9). The court below asserted jurisdiction only to the limited degree necessary for the determination of the First Amendment issue. It did not examine the wisdom or sagacity of the political judgment made by Congress and appellants that alien exclusion may be an appropriate tool for such purposes as reprisals against foreign governments or for protecting national security by keeping out aliens about whom there is secret or insufficient information with respect to the possibility of their engaging in unlawful activity after entry. Since no such purpose was asserted as a basis for excluding Dr. Mandel, the court below did not even reach the issue of "less drastic" means involved in *Robel*, 389 U.S. at 286.

Appellants rely on *Boutilier v. INS*, 387 U.S. 118, 123 and other decisions which sustain Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." None of these decisions, including *Knauff v. Shaughnessy*, 338 U.S. 537 and *Turner v. Williams*, 194 U.S. 279, upon which appellants chiefly rely, involves a suit by American citizens to enforce their First Amendment right to engage in academic discussions with the alien in this country. None of these decisions discusses or even raises that issue. These cases involved aliens who sought to enter or remain in the country perma-

21. Brief for the Government in *Kent v. Dulles*, p. 26.

nently, not merely for a temporary period and solely for the purpose of fulfilling invitations to speak. In each case the rights asserted were exclusively those of the alien, who generally has none. See *Knauff v. Shaughnessy*, *supra*; *Turner v. Williams*, *supra*.

Knauff, moreover, was a plurality opinion with strong dissents registered by Justices Jackson, Black and Frankfurter. *Turner* actually applied the First Amendment test then applicable to speech by citizens. And in *Harisiades v. Shaughnessy*, 342 U.S. 580 the Court applied the standard of *Dennis v. United States*, 341 U.S. 494, 509-515 to determine the deportability of a member of the Communist Party. See also *Bridges v. Wixon*, *supra*. Significantly, in *Harisiades*, as the court below noted, this Court "did not rely upon *Turner* (which was cited to it) nor invoke the argument (made to it) that the power to expel aliens is an attribute of sovereignty essentially relating to foreign affairs and national safety and, therefore, not restricted impliedly by provisions of the Constitution which do not expressly relate to it." (15a)

These cases and another, *Zemel v. Rusk*, *supra*, upon which the appellants rest their position not only do not support it, but in fact serve to underscore its fatal deficiency. In each of those cases, unlike this one, the Government asserted, and the Court found, that the particular actions complained of furthered a specific legitimate and substantial, if not compelling, interest of the United States.

In the *Chinese Exclusion Cases*, *supra* (Chinese laborers); *Nishimura Ekiu v. United States*, 142 U.S. 651 (paupers); and *Boutilier v. INS.*, *supra* (homosexuals), the Court sustained the exclusion of the aliens involved, based on evidentiary records in which the Government had established that admission endangered the economic, medical or social welfare in the country. In *Turner* the Court concluded that a permanent resident alien should be deported where the Government's evidence established that the alien "contemplated the ultimate realization of his ideal [elimination of government] by use of force or that his speeches were incitements to that end." 194

U.S. at 264 and 269 (Mr. Justice Brewer concurring). The same conclusion was reached in *Harisiades* after the Court applied the *Dennis* standard to the evidentiary record made by the government. *Galvan* sustained the deportation of a knowing member of the Communist Party based on evidence submitted by the Government and on Congressional findings concerning the inherent danger posed by such membership. Cf. *Barenblatt v. United States*, 360 U.S. 109, 127-128.

Knauff upheld as "reasonable" the exclusion of an alien based on a statute which was effective only in time of war or national emergency, and on an assertion by the Attorney General, not made here, that the alien's admission would be prejudicial to the interests of the United States on the basis of confidential information, the disclosure of which would endanger national security.

We stress that in each of these cases the Court required a showing that the deportation or exclusion related in fact to a legitimate government interest, although none of the cases involved the assertion of First Amendment rights by citizens. Therefore, if the broader language of the Court in *Galvan* and *Turner* would sustain deportation of a resident alien based on membership in the Communist Party or a philosophical belief in anarchism, it must be discounted by the fact that the Government interest asserted was never tested against the rights of anyone but aliens.

The situation in *Zemel*, contrary to appellants' view, thoroughly undermines their position. *Zemel* sustained Department of State regulations generally banning validation of passports for Cuba. The Court acknowledged that the refusal to validate passports inhibited travel to Cuba but held that in light of the compelling necessity demonstrated by the Government, the resulting interference with the right to gather information about Cuba was not unconstitutional. As the Court stated, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. at 17. But, that the right to gather or receive information may be restrained, like any other exercise of First Amendment right, does

not mean that it may be restrained without justification, and certainly not for the purpose of preventing citizens from gathering or receiving the information they seek.

Zemel patently does not support appellants' claim of absolute and unreviewable power "to refuse or to grant visas to certain aliens, including Mandel and those similarly situated." (Juris. State., p. 10). In fact the Court pointedly rejected any assumption "that simply because a statute deals with foreign relations, it can grant the executive totally unrestricted freedom of choice." 381 U.S. at 17. Quite unlike this case and in striking contradiction to appellants' contentions, *Zemel* was expressly predicated on an overwhelming showing by the Government that the refusal to validate passports to Cuba was substantially related to furthering specific foreign and domestic interests of the United States.²² In marked contrast to this case, where no such interest is claimed to be served, *Zemel* was based on what the Court termed the "weightiest considerations of national security" including the existence of extreme hostility between this nation and Cuba, the fact that restrictions on passport validations were instituted in the direct aftermath of the Cuban missile confrontation and the severance of diplomatic relations with Cuba, and the determination by our Government and other members of the Organization of American States that travel restrictions were necessary to combat alleged subversion of Western Hemisphere countries.²³

22. It was precisely on this basis, which distinguishes the instant case from *Zemel*, that the Government sought to differentiate the circumstances of *Zemel* from those of *Kent v. Dulles, supra*. Thus the Government characterized the passport regulation involved in *Kent*, as having only a "remote relationship to foreign policy for it was aimed, not at intercourse with a particular country because of the state of international relations, but at a small class of American citizens regardless of international conditions or the country to which they wish to travel." Brief for the Government in *Zemel v. Rusk*, p. 22. By contrast the regulations in *Zemel*, as the Government pointed out, was narrowly and directly related to the Cuban missile and diplomatic crises. *Id.* at p. 35.

23. It should be noted that the policy involved in *Zemel* only inhibited travel but did not impose any criminal or other sanctions. See *United States*

CONCLUSION

The court below was unquestionably correct in enforcing the First Amendment rights of American citizens to meet with Dr. Mandel, an alien scholar, in this country, where appellants have advanced no legitimate government interest that is served by preventing such meetings. The motion to affirm should be granted.

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v. Laub, 385 U.S. 475. Here the ban on Dr. Mandel's admission, is in every practical sense, absolute.

Moreover, Zemel sought validation of his passport for travel to Cuba "to satisfy [his] curiosity . . . and to make [him] a better informed citizen." 381 U.S. at 4. When measured against the national security and foreign policy considerations advanced by the Government, the extremely personal privilege of one citizen appears an insufficient basis for the relief he requested. Here, again by contrast, no specific Government interests are involved, and the appellees assert the rights of university and large general audiences, which guarantee to serve the public interest in intensive analysis and wide dissemination of the information gleaned from Dr. Mandel's appearances. See *Teague v. Regional Commissioner*, *supra* at 446 n. 6.

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE
UNITED STATES, AND WILLIAM P. ROGERS, SEC-
RETARY OF STATE, APPELLANTS

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY
LEONTIFF, NORMAN BIRNBAUM, ROBERT L. HEIL-
BRONER, ROBERT PAUL WOLFF, LOUIS MENASHE,
NOAM CHOMSKY, AND RICHARD A. FALK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions In- volved	2
Statement	4
Summary of Argument	10
Argument:	
I. This Case Is Governed By the Long-Line of Decisions of this Court Holding that the Power to Exclude Aliens Is Inherent in Sovereignty, Necessary for Maintaining Normal International Relations and for Defending Against Foreign Dangers, and that Under the Constitution Formulation of Policies Regarding the Admission of Aliens Is Entrusted Exclusively to Con- gress	14
A. For Nearly A Century Congress Has Exercised Its Plenary Authority To Determine What Aliens Should Be Allowed to Enter the Country	15
B. From The Beginning, This Court Has Recognized That Formulation of Poli- cies Regarding the Admission of Aliens Is Entrusted Under the Con- stitution Exclusively To The Political Branches of Government	19

- C. These Decisions Control This Case And Can Be Distinguished Neither On the Basis That Here Exclusion of The Alien Will Deprive People In This Country Of The Opportunity To Meet Him In The United States, Nor On the Basis That Here The Alien Has Been Denied Entry Because Of His Adherence to Communist Political Doctrine 22
- D. The First Amendment's Guarantee Of Freedom of Speech Does Not Include The Freedom To Bring An Otherwise Excludable Alien Into This Country 29
1. In Exercising Its Plenary Power In Section 212(a)(28)(D) and (G)(v) To Make Rules For the Admission of Aliens, Congress Did Not Restrain The Freedom of Speech of People In this Country, But Instead Restricted Only Action—The Action Of The Alien In Coming Into This Country 29
 2. Section 212(a)(28)(D) and (G)(v), Which Rests Upon Considerations of Foreign Policy And National Security, Represents A Legitimate Exercise of Congress' Exclusive Authority to Decide What Aliens Should Be Entitled to The Hospitality of This Country And Can Be Revised Only By

III

Argument—Continued	Page
International Diplomacy or New Legislation	35
Conclusion	40

CITATIONS

Cases:

<i>Aptheker v. Secretary of State</i> , 378 U.S. 500	30
<i>Boutilier v. Immigration and Naturalization Service</i> , 387 U.S. 118	20, 21, 26
<i>Brooks v. Auburn University</i> , 412 F.2d 1171	32
<i>Bugajewitz v. Adams</i> , 228 U.S. 228 U.S. 585	21, 26
<i>Caminita, Ex parte</i> , 291 Fed. 913	28
<i>Communist Party v. Subversive Activities Control Board</i> , 367 U.S. 1	16
<i>Ekiu v. United States</i> , 142 U.S. 651	19, 20
<i>Fok Yung Yo v. United States</i> , 185 U.S. 296	21
<i>Fong Yue Ting v. United States</i> , 149 U.S. 698	20
<i>Galvan v. Press</i> , 347 U.S. 522	16, 21, 25, 26, 27, 28, 36, 38
<i>Graham v. Richardson</i> , 403 U.S. 365	21, 26
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580	16, 19, 21, 23, 24, 26, 28, 36, 37, 38
<i>Hines v. Davidowitz</i> , 312 U.S. 52	20, 21
<i>Karnuth v. United States</i> , 279 U.S. 231	19
<i>Keller v. United States</i> , 213 U.S. 138	21
<i>Lamont v. Postmaster General</i> , 381 U.S. 301	32, 33
<i>Lem Moon Sing v. United States</i> , 158 U.S. 538	20

IV

Cases—Continued

	Page
<i>Li Sing v. United States</i> , 180 U.S. 486.....	21
<i>Low Wah Suey v. Backus</i> , 225 U.S. 460.....	21
<i>Mahler v. Eby</i> , 264 U.S. 32	21
<i>Marbury v. Madison</i> , 1 Cranch 137	28
<i>Ng Fung Ho v. White</i> , 259 U.S. 276	21, 26
<i>Oceanic Navigation Co. v. Stranahan</i> , 214 U.S. 320	20, 21
<i>Shaughnessy v. Mezei</i> , 345 U.S. 206	21
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234	34
<i>The Chinese Exclusion Case</i> , 130 U.S. 581	20
<i>The Japanese Immigration Case</i> , 189 U.S. 86	21
<i>Tiaco v. Forbes</i> , 228 U.S. 549	21
<i>United States v. Ju Toy</i> , 198 U.S. 253	21
<i>United States v. Röbel</i> , 389 U.S. 258	31, 38
<i>United States ex rel. Knauff v. Shaughnessy</i> , 338 U.S. 537	21
<i>United States ex rel. Turner v. Williams</i> , 194 U.S. 279	21, 23, 26, 27
<i>United States ex rel. Volpe v. Smith</i> , 289 U.S. 422	21
<i>Wong Wing v. United States</i> , 163 U.S. 228	21
<i>Zakonaite v. Wolf</i> , 226 U.S. 272	21
<i>Zemel v. Rusk</i> , 381 U.S. 1	12, 29, 30, 32, 34, 38

Constitution, Treaties and conventions,
statutes and regulations:

United States Constitution:

Article I	19
First Amendment	2, 3, 7, 9, 11, 12, 14, 22, 23, 24, 29, 31, 32, 33, 34, 39
Fifth Amendment	30, 31

v

Constitution, Treaties and conventions,
statutes and regulations—Continued

Page

Jay Treaty of 1794, Art. III, 8 Stat. 116, 117	19
<i>Convention Between the United States of America and other American Republics regarding the status of aliens, Article I, 46 Stat. 2753</i>	20
Act of March 3, 1875, 18 Stat. 477	15
Act of August 3, 1882, 22 Stat. 214	15
Act of March 3, 1903, 32 Stat. 1213, Sec- tion 2	10, 15, 23
Act of February 5, 1917, 39 Stat. 874	15, 18
Act of October 16, 1918, 40 Stat. 1012	15
Alien Registration Act of 1940, 54 Stat. 670	10, 16, 24
Section 20, 54 Stat. 671	16
Section 23, 54 Stat. 673	10, 16
Immigration & Nationality Act of 1952:	
Section 101(a)(40), 8 U.S.C. 1101 (a)(40)	17
Section 212(a)(8), (10), (11) and (12), 8 U.S.C. 1182(a)(8), (10), (11) and (12)	31
Section 212(a)(28), 8 U.S.C. 1182 (a)(28)	5, 7, 8, 13, 18, 22, 31, 32, 34, 35, 36, 37, 39
Section 212(a)(28)(D), 8 U.S.C. 1182(a)(28)(D)	3, 5, 10, 17, 22, 27, 29, 30, 35, 36
Section 212(a)(28)(G)(v), 8 U.S.C. 1182(a)(28)(G)(v)	3, 5, 10, 17, 22, 27, 29, 30, 35, 36

Constitution, Treaties and conventions,
statutes and regulations—Continued

	Page
Section 212(a) (27), 8 U.S.C. 1182	
(a) (27)	36
Section 212(d) (2), 8 U.S.C. 1182	
(d) (2)	18
Section 212(d) (3) (A), 8 U.S.C.	
1182(d) (3) (A)	4, 5, 8, 18
Section 212(d) (6), 8 U.S.C. 1182	
(d) (6)	18
Section 243(g), 8 U.S.C. 1253(g).....	37
Internal Security Act of 1950, 64 Stat.	
987	10, 16, 17, 18, 35
Section 2(1)	25
Section 22, 64 Stat. 1006	16, 25, 27
Priv. L. No. 380, 68 Stat. A57 (1954)	39
28 U.S.C. 2282	8

Miscellaneous:

Borchard, <i>Diplomatic Protection of Citizens Abroad</i>	19, 20
Bouvé, <i>Exclusion and Expulsion of Aliens</i>	19
98 Cong. Rec. 5620	17
Constitution of the Intergovernmental Committee for European Migration, 6 <i>United States Treaties and Other International Agreement</i> 603 (1955)	20
Emerson, <i>Toward a General Theory of the First Amendment</i> (1966)	30
1 Gordon & Rosenfield, <i>Immigration Law and Procedure</i> § 1.2 (1967 ed.)	15, 37, 38
III Hackworth, <i>Digest of International Law</i> (1942)	20
Hall, <i>International Law</i> (6th ed. 1909)	20

Miscellaneous—Continued

Page

Henkin, <i>The Treaty Makers and the Law Makers: The Niagara Reservation</i> , 56 Colum. L. Rev. 1151 (1956)	37
Henkin, <i>The Treaty Makers and the Law Makers: the Law of the Land and Foreign Relations</i> , 107 U. Pa. L. Rev. 903 (1959)	24
H. Rep. No. 1365, 82d Cong., 2d Sess.	17
H. Rep. No. 3112, 81st Cong., 2d Sess.	16
Jefferson, <i>Notes on the State of Virginia</i> (Peden ed. 1954)	19
Joint Hearings on S. 716, H.R. 2379 and H.R. 2816 before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess. (1951)	17
Kingsley, <i>Immigration and Our Foreign Policy Objectives</i> , 21 Law and Contemp. Problems 299 (1956)	35
4 Moore, <i>International Law Digest</i> (1906)	20
3 <i>Papers of James Madison</i> (1840)	19
Report to the Senate Committee on the Judiciary of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, <i>Visa Procedures of Department of State</i> , 87th Cong., 2d Sess.	39
S. 2842, 82d Cong., 2d Sess.	17
S. Rep. No. 1515, 81st Cong., 2d Sess.	15, 37
S. Rep. No. 2369, Part 2, 81st Cong., 2d Sess. (Minority Report)	36
S. Rep. No. 1137, 82d Cong., 2d Sess.	17
Van Alstyne, <i>Political Speakers At State Universities</i> , 111 U. Pa. L. Rev. 328 (1963)	32
II Vattel, <i>Le Droit Des Gens</i> (1758)	19

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-16

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE
UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANTS

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIEFF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

f
OPINION BELOW

The opinion of the three-judge district court (J. App. 1a-28a)¹ and the opinion of the dissenting Judge (J. App. 35a-59a) are reported at 325 F. Supp. 620.

¹ "J. App." refers to the Appendix to the Jurisdictional Statement.

JURISDICTION

The judgment of the three-judge district court (J. App. 60a) was entered on April 13, 1971. The notice of appeal (J. App. 62a) was filed on May 3, 1971. On May 11, 1971, the district court granted a stay of its judgment until June 10, 1971 (App. 92), and on June 10, 1971, granted a further stay (App. 93) pending decision on appeal. This Court noted probable jurisdiction on January 10, 1972 (App. 94). The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Section 212(a)(28)(D) and (G)(v) and Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(28)(D) and (G)(v), 1182(d)(3)(A)), which provide that certain aliens shall be excluded from entry into the United States unless the Attorney General, in his discretion, waives inadmissibility, are unconstitutional on the ground that they deprive American citizens, who wish to hear in person an alien excluded under those provisions, of freedom of speech under the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 212(a) of the Immigration and Nationality Act of 1952 provides in pertinent part:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship * * *

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching * * * (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952 provides in pertinent part:

Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) * * * may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General * * *.

* * * *

STATEMENT

Appellee Ernest Mandel is a Belgian citizen and resident of Brussels (J. App. 3a). He is a professional journalist, editor-in-chief of the Belgian Left Socialist weekly publication, *La Gauche* [*The Left*], and the author of the two-volume work *Marxist Economic Theory* (App. 25). Although not a member of the Communist Party, Mandel characterizes himself as a "revolutionary Marxist" (App. 61) and is "an Orthodox Marxist of the Trotskyist School" (J. App. 3a); he advocates the economic, international and governmental doctrines of world communism (J. App. 4a-5a).

On September 8, 1969, Mandel applied to the American consul in Brussels, Belgium, for a nonimmigrant visa to enter the United States and remain for

six days, during which he would participate in a conference on "Technology and the Third World" at Stanford University (J. App. 5a-6a; App. 40). On October 22, 1969, after several universities and other institutions in this country invited him to lecture and participate in various conferences, Mandel filed another visa application with a more extensive itinerary (J. App. 6a; App. 44).

On October 23, 1969, the American consul in Brussels orally advised Mandel that his visa application of September 8th had been refused; the consul confirmed this in writing on October 30, 1969 (J. App. 6a; App. 13). The consul's letter informed Mandel that he was ineligible for a visa under Section 212 (a) (28) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a) (28)), a copy of which was enclosed. The consul referred to provisions providing, in part, that aliens who "advocate the economic, international, and governmental doctrines of World communism" and aliens "who write or publish * * * any written or printed matter * * * advocating or teaching * * * the economic, international, and governmental doctrines of world communism" shall be ineligible to receive a visa and shall be excluded from admission into the United States. Section 212(a) (28) (D) and (G) (v). The letter also explained that a request for a waiver of ineligibility, which the consul had submitted pursuant to Section 212(d) (3) (A). (8 U.S.C. 1182(d) (3) (A)) had likewise been refused. Under that provision, the Attorney General may in his discretion direct that a visa be granted after receipt "of a recommendation by the

Secretary of State" that an "alien be admitted temporarily despite his inadmissibility."² In conclusion, the consul informed Mandel that a second request for waiver, which had been forwarded after Mandel filed his second visa application on October 22, was currently pending. (App. 13-14).

With respect to Mandel's original visa application on September 8, 1969, the Secretary of State initially declined to recommend that the ineligibility provision be waived. The Attorney General had granted Mandel such a waiver in 1962 to enter the country as a working journalist (App. 43). He had been granted another waiver when he came here in 1968 to lecture (App. 43). The Secretary found that although both of the waivers that allowed Mandel to come here had been conditioned upon Mandel's conforming to the itinerary and limiting his activities to the purposes set forth in his visa applications, he had engaged in activities beyond the stated purposes of his trip in 1968 (App. 21-22), including raising money for French students who had been convicted during the rebellion that occurred there in May 1968 (App. 29, 47).

Mandel later assured the American consul that he would conform to the itinerary and purposes set forth in his October 22 visa application and would not solicit money for any political causes (App. 29). The Secretary, in view of Mandel's statement and

² The consul's letter noted that Mandel had been granted waivers under this provision on his prior visits to this country in 1962 and 1968 (App. 14).

the Department of State's opinion that in 1968 Mandel may not have been fully aware that he was required to limit his activities to those stated in his itinerary, recommended to the attorney General that Mandel's ineligibility be waived (App. 43). However, the Attorney General refused to grant the waiver and so notified Mandel's attorney on February 13, 1970; stating that on Mandel's last visit to this country his activities "went far beyond the stated purposes of his trip and represented a flagrant abuse of the opportunities afforded him to express his views in this country" (App. 68).

On March 19, 1970, Mandel, joined by the other appellees, who are United States citizens,³ instituted this action against the Attorney General and the Secretary of State, claiming that the statutory provisions under which Mandel had been excluded are unconstitutional and that their application to Mandel was arbitrary and unreasonable. Specifically, the American plaintiffs argued that Mandel's exclusion violated the First Amendment because it deprived them of the opportunity to hear him speak and to debate with him in person in the United States, and that Section 212(a)(28) of the Immigration and Nationality Act of 1952 is therefore unconstitutional on its face and as applied. Mandel and the other plaintiffs also claimed that the Act denied equal protection of the law by excluding leftists but not rightists,

³ These appellees are persons who invited Mandel to speak, or who were to participate in programs with Mandel or who wished to have Mandel visit their university or group (App. 10).

that the Act violated the due process clause by failing to provide standards for the exercise of the Secretary's and the Attorney General's discretion with respect to waiving ineligibility, and that the Attorney General acted arbitrarily in refusing to accept the Secretary's recommendation that Mandel be admitted temporarily. Plaintiffs sought an injunction against the operation of these provisions and a declaratory judgment. A three-judge district court was convened pursuant to 28 U.S.C. 2282.

The district court, with one judge dissenting, held that although Mandel had no individual right to enter the country,⁴ "the citizens of the country [have a right under the First Amendment] to have the alien enter and to hear him explain and seek to defend his views" (J. App. 22a-23a).⁵ In the court's view, an alien could be excluded for advocating communism only if this amounted to "incitement or conspiracy to initiate presently programmed violence" (J. App. 24a), but where a prospective audience in this country awaits an alien, he cannot otherwise be refused a visa on the basis of his political affiliations or philosophy—neither the Executive nor Congress has any such discretion to exercise (J. App. 24a-25a). The court therefore issued a preliminary "injunction against the defendants' implementing and enforcing Sections 212(a)(28) and 212(d)(3)(A)

⁴ The district court stated that appellees had not argued that Mandel did not fall within Section 212(a)(28). See J. App. 8a.

⁵ Appellees introduced affidavits with exhibits; the government introduced no evidence. The court decided the case on appellees' motion for a preliminary injunction (J. App. 3a).

* * * so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor" and a "declaratory judgment that Section 212(a)(28) is invalid and Section 212(d)(3)(A) is inoperative so far as they have been invoked to find plaintiff Mandel ineligible for admission * * *" (J. App. 28a).⁶

Judge Bartels dissented on the basis that although the majority recognized "the sovereign power to exclude in the interest of self-preservation, they subordinate this interest to the First Amendment interest by applying standards invoked exclusively to strictures upon speech by American citizens and strictures upon the right of American citizens to hear other American citizens" and, in so doing, the "majority has ignored the crucial fact that [Section 212(a)(28)] serves the important objectives of (1) national security and (2) foreign policy * * *" (App. 36a). The dissent further noted that these provisions likewise do not purport to ban the espousal of world communism by any citizen in the United States, nor do they seek to ban the importation of books, articles, or pamphlets written by Mandel⁷ or

⁶ The court did not pass on appellees' other contentions that the Attorney General arbitrarily refused to waive Mandel's exclusion, that the Act violated the due process clause because it supplied no standards for the exercise of the Attorney General's discretion to waive exclusion, and that the Act denied Equal Protection of the laws.

⁷ Mandel's works—*Marxist Economic Theory, An Introduction To Marxist Economic Theory* and *The Marxist Theory of the State*—are sold and distributed in the United States (App. 54, 87).

any other alien expressing the doctrines that Mandel desired to lecture upon or debate about in the United States.*

SUMMARY OF ARGUMENT

A.

After enacting legislation in 1875 to bar the entry of certain aliens, Congress in 1903 expanded the classes of aliens ineligible for admission to include anarchists or persons who believe in overthrowing the government of the United States by force. Act of 1903, Section 2, 32 Stat. 1213, 1214. Further legislation followed with respect to subversive aliens in 1940, and, in 1950, after years of extensive study and numerous reports by Congressional Committees, Congress determined that aliens who advocated the economic, international and governmental doctrines of world communism should be ineligible for entry into the United States. Act of 1950, 64 Stat. 987, 1006. There is no question that these provisions, as carried forward in the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v),

* The speech by Mandel, entitled *Revolutionary Strategy In the Imperialist Countries* originally scheduled to be presented at the conference sponsored by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference on November 29, 1969, on the theme of "Agencies of Social Change; Towards a Revolutionary Strategy for Advanced Industrial Countries," was subsequently tape recorded by Mandel and sent to this country where it was presented to an audience of 1,200 persons. The speech was also published by the Pathfinder Press, Inc. of New York in 1970 for distribution (App. 51; J. App. 3a).

rendered Mandel ineligible for a nonimmigrant visa to enter this country (J. App. 8a).⁹

B.

Ever since there have been nation states, it has been recognized that the power to exclude or admit foreigners is inherent in sovereignty. And ever since the question first arose, the Court has affirmed this ancient maxim⁸ of international law and held that the formulation of policies with respect to which aliens may enter the United States is entrusted exclusively to the Congress. These are policies that are peculiarly concerned with the political conduct of government, touching on foreign relations and national security. In decisions stretching over a period of nearly one hundred years, the Court has never departed from or modified the principle that Congress has plenary power to control the admission of aliens and that under the Constitution these are matters beyond the concern or competence of the Judiciary.

C.

These decisions are controlling here. The guarantee of freedom of speech in the First Amendment does not confer any right on an individual in this country to compel the admission of aliens that Congress has determined to be ineligible for entry. To be sure, exclusion of an alien precludes people here from meeting him face-to-face in this country. But

⁸ The district court did not pass on appellees' contention that the Attorney General arbitrarily refused to exercise his discretion, see note 6, *supra*.

that is the inevitable consequence anytime any alien is denied entry. And in the host of cases dealing with the exclusion of aliens, the Court must have been aware of this self-evident fact when it upheld, against various constitutional challenges, Congress' exclusive power to prescribe the terms and conditions for admission. Nor is this case any different because here the alien was denied entry on the basis of his adherence to the doctrines of communism. Since the beginning of this century, Congress has denied admission to certain aliens because of their political philosophy or affiliations; and in each such case that has come before the Court, including cases dealing with aliens who were only past adherents to communism, Congress' plenary power in this area has been sustained.

D.

There is no reason for the Court to depart from these firmly-established principles regarding Congress' control over the admission of aliens. Congress' exclusion of aliens such as Mandel does not implicate any First Amendment rights of appellees. In *Zemel v. Rusk*, 381 U.S. 1, this Court rejected a challenge under the First Amendment to the Secretary of State's refusal to validate the passport of an American citizen for travel to Cuba. The Court held that the First Amendment simply was not involved since any inhibition was on action, not speech. The same is true here.

Action, not speech, is being regulated—the action of an alien, who has no personal First Amendment

right to come to this country and speak, as appellees themselves recognize. Moreover, the statute in question in no way restrains or inhibits appellees from speaking or publishing: what they have said or written, the people they have associated with and the organizations they have joined, are not related in any way to the exclusion of Mandel under Section 212 (a) (28).

That statute is an expression of United States foreign policy and is also based on considerations of national security. Congress had adequate grounds for enacting it after years of extensive investigation of the world communist movement. By denying this country's hospitality to alien communists, the statute expresses to the rest of the international community this country's opposition to the communist movement and serves as a lever for negotiating reciprocal immigration privileges with other nations. If these policies should be changed, it must be done through international diplomacy or new legislation.

Moreover, since Congress perceived a danger to this country from alien adherents to world communism, it was not limited to denying admission only to those alien communists who advocate and actively seek violent overthrow of the United States government. In light of difficulties of investigation and proof, as well as delicate questions regarding the propriety of the United States investigating residents of foreign countries in their homelands, Congress was entitled to decline to accept the burden that such a classification would entail.

As this Court has held from the outset, controlling the admission of aliens is entrusted exclusively to Congress. In validly exercising its authority here, Congress did not abridge appellees' freedom of speech. The First Amendment does not confer upon appellees the right to determine what aliens should be permitted to enter the country.

ARGUMENT

I. This Case Is Governed by the Long-Line of Decisions of This Court Holding that the Power to Exclude Aliens Is Inherent in Sovereignty, Necessary for Maintaining Normal International Relations and for Defending Against Foreign Dangers, and that Under the Constitution Formulation of Policies Regarding the Admission of Aliens Is Entrusted Exclusively to Congress

The only question presented by this case is whether Congress' exclusion of aliens such as Mandel violates the First Amendment because people in this country may wish to hear such aliens in person. The court below did not pass on appellees' further contentions regarding the Attorney General's discretion to waive exclusion.¹⁰

¹⁰ See note 6, *supra*. The district court stated that "the Government is without any power to act in the area defined by [Section 212] (a) (28) and the presence or absence of procedural due process in the attempted administration of subsection (d) (3) [the waiver provision] becomes irrelevant" (J.App. 26a).

A., *For Nearly a Century Congress Has Exercised Its Plenary Authority to Determine What Aliens Should Be Allowed to Enter the Country*

After a century of unimpeded alien migration to the United States, Congress in 1875 established grounds upon which aliens might be refused entry,¹¹ and, seven years later, enacted the first general immigration statute. Act of August 3, 1882, 22 Stat. 214. Further legislation soon followed,¹² including a general revision of the immigration laws in 1903 that enlarged the classes of aliens ineligible for admission to include, among others, "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." Act of March 3, 1903, Section 2, 32 Stat. 1213, 1214. In 1918, after another general revision of the immigration laws,¹³ Congress expanded the provisions for excluding subversive aliens. Act of October 16, 1918, 40 Stat. 1012.¹⁴

¹¹ Act of March 3, 1875, 18 Stat. 477, barring convicts and prostitutes. See generally S. Rep. No. 1515, 81st Cong., 2d Sess. 43-65 (1950); and 1 Gordon & Rosenfield, *Immigration Law and Procedure* § 1.2 (1967 ed.).

¹² See 1 Gordon & Rosenfield, *supra*.

¹³ Act of February 5, 1917, 39 Stat. 874.

¹⁴ Included were "aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of, or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States * * *."

The Alien Registration Act of 1940, 54 Stat. 670, 673, amended the Act of 1918 to bar the entry not only of aliens who presently advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States government, but also aliens who at any time had so advocated or belonged to such organizations. In *Harisiades v. Shaughnessy*, 342 U.S. 580, this Court sustained the constitutionality of that Act, which had been invoked to deport a resident alien who had formerly belonged to the Communist Party.¹⁵

Ten years later, after extensive investigation and numerous reports by Congressional Committees,¹⁶ Congress passed the Internal Security Act of 1950, 64 Stat. 987, "in order to strengthen the provisions of [the 1918] act which relate to the exclusion * * * of subversive aliens." H. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950). The 1950 Act included certain communists among the class of excludable aliens and dispensed with the requirement of the 1940 Act of finding in each case, with respect to members of the Communist Party, that the Party did in fact advocate violent overthrow of the government.¹⁷ (Section 22 of the Act, 64 Stat. 1006). After further hear-

¹⁵ The grounds for deportation under the Act were essentially the same as those for barring initial entry. Compare Section 20, 54 Stat. 671, with Section 23, 54 Stat. 673.

¹⁶ See *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 94-95 n. 37, citing many of the committee reports issued during this period dealing with communism.

¹⁷ See *Galvan v. Press*, 347 U.S. 522, 529.

ings,¹⁸ these provisions were carried forward in the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. 1182.

Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(28)(D) and (G)(v)) is thus derived directly from the Internal Security Act of 1950.¹⁹ Under these provisions, aliens are ineligible to receive visas and are excluded from admission into the United States if they "advocate the economic, international, and governmental doctrines of World communism,"²⁰ Section 212(a)(28)(D), or if they write or publish material so advocating, Section 212(a)(28)(G)(v).²¹ However, the Immigration and Nationality Act, as had the Internal Security Act of 1950,²² provided an

¹⁸ See Joint Hearings on S. 716, H.R. 2379 and H.R. 2816 before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess. (1951).

¹⁹ See H. Rep. No. 1365, 82d Cong., 2d Sess. 137-138 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952).

²⁰ Section 101(a)(40), 8 U.S.C. 1101(a)(40), provides:

The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist political movement.

²¹ Senators Humphrey and Lehman, the principal opponents of the 1952 Act in the Senate, proposed a substitute bill, S. 2842, 82d Cong., 2d Sess., but with respect to Sections 212(a)(28)(D) and (G)(v), the provisions of the Humphrey-Lehman bill and of the bill subsequently enacted, were the same. 98 Cong. Rec. 5620 (1952).

²² See 64 Stat. 1007.

exception to the exclusion provisions in Section 212 (a) (28) for temporary admissions of the diplomatic officers and, upon a basis of reciprocity, other representatives of foreign governments and their families. Section 212(d) (2).

Also, with respect to an alien excludable under Section 212(a) (28); the Attorney General in his discretion may waive inadmissibility upon approval of a "recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility," Section 212 (d) (3).²³ The Attorney General must make a detailed report to Congress about waivers of exclusion.²⁴ Section 212(d) (6).

²³ The Act of 1950, 64 Stat. 987, 1008-1009, also provided a waiver procedure, as had earlier legislation, see Act of 1917, 39 Stat. 874, 878.

²⁴ The Immigration and Naturalization Service reports the following with respect to applications to the Attorney General for waiver of an alien's ineligibility for admission under Section 212(a) (28) :

Year	Total Number of Applications for Waiver of Section 212 (a) (28)	Number of Waivers Granted	Number of Waivers Denied
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8

B. From the Beginning, This Court Has Recognized That Formulation of Policies Regarding the Admission of Aliens Is Entrusted Under the Constitution Exclusively to the Political Branches of Government

In prescribing the conditions for allowing aliens to enter the country, Congress acted in accordance with the ancient principle of international law that a nation state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions.²⁵ This firmly-established principle, dating from Roman times,²⁶ received recognition during the Constitutional Convention²⁷ and has continued to be an important postulate in the foreign relations

²⁵ See, e.g., *Ekiu v. United States*, 142 U.S. 651, 659; *Hirsiades v. Shaughnessy*, 342 U.S. 580, 596 (Mr. Justice Frankfurter, concurring); Bouvé, *Exclusion and Expulsion of Aliens*, 4 and n. 3 (1912), and authorities there cited; II Vattel, *Le Droit Des Gens*, §§ 94, 100 (1758).

²⁶ Borchard, *Diplomatic Protection of Citizens Abroad*, 33, 44-48 (1915).

²⁷ See 3 *Papers of James Madison* 1277 (1840), where Madison reports Gouverneur Morris' observation during the debates that "every society, from a great nation down to a club, ha[s] the right of declaring the conditions on which new members should be admitted." Article I, Section 9, Clause 1, of the Constitution itself is an implicit recognition of Congress' authority to regulate immigration. In addition, Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, provided that British and American subjects could freely cross the Canadian border. See *Karnuth v. United States*, 279 U.S. 231. As to the Colonial understanding of the sovereign's power to control the admission of aliens, see Thomas Jefferson, *Notes on the State of Virginia* 83-85 (Peden ed. 1955).

of this country and the other members of the international community.²⁸

Nearly a century ago this Court recognized the power to exclude aliens as inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government and not “granted away or restrained on behalf of any one.” *The Chinese Exclusion Case*, 130 U.S. 581, 609. “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens. *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339. And since the decision in the *Chinese Exclusion Case*, the Court has, without exception, sustained Congress’ “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123. See, e.g., *Ekiu v. United States*, 142 U.S. 651, 659; *Fong Yue Ting v. United States*, 149 U.S. 698, 713; *Lem Moon Sing v. United States*, 158 U.S.

²⁸ See *Convention Between the United States of America and other American Republics regarding the status of aliens*, Article I, 46 Stat. 2753, 2754 (1928); Constitution of the Intergovernmental Committee for European Migration, 6 *United States Treaties and Other International Agreements* 603, 604 (1955); *Hines v. Davidowitz*, 312 U.S. 52; III Hackworth, *Digest of International Law* 725-729 (1942); Hall, *International Law* 211-212 (6th ed. 1909); 4 Moore, *International Law Digest* 151-174 (1906); Borchard, *supra* note 26, at 44-48.

538;²⁹ *Wong Wing v. United States*, 163 U.S. 228, 237; *Li Sing v. United States*, 180 U.S. 486, 495; *Fok Yung Yo v. United States*, 185 U.S. 296, 302; *The Japanese Immigration Case*, 189 U.S. 86, 97; *United States ex rel. Turner v. Williams*, 194 U.S. 279; *United States v. Ju Toy*, 198 U.S. 253, 261; *Keller v. United States*, 213 U.S. 138, 143-144; *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320; *Low Wah Suey v. Backus*, 225 U.S. 460, 467-468; *Zakonaite v. Wolf*, 226 U.S. 272, 275; *Tiaco v. Forbes*, 228 U.S. 549, 556-557; *Bugajewitz v. Adams*, 228 U.S. 585, 591; *Ng Fung Ho v. White*, 259 U.S. 276, 280; *Mahler v. Eby*, 264 U.S. 32, 40; *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425; *Hines v. Davidowitz*, 312 U.S. 52; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-543; *Harisiades v. Shaughnessy*, 342 U.S. 580; *Shaughnessy v. Mezei*, 345 U.S. 206, 210; *Galvan v. Press*, 347 U.S. 522; *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123; cf. *Graham v. Richardson*, 403 U.S. 365, 377.

Thus, with respect to the extent of Congress' power in this area, there is, as the Court stated in *Galvan v. Press*, *supra*, 347 U.S. at 531, "not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U.S.

²⁹ Mr. Justice Harlan there said: "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." 158 U.S. at 547.

345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." In short, "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Id.* at 531.

C. These Decisions Control This Case and Can Be Distinguished Neither on the Basis That Here Exclusion of the Alien Will Deprive People in This Country of the Opportunity to Meet Him in the United States, nor on the Basis That Here the Alien Has Been Denied Entry Because of His Adherence to Communist Political Doctrine

In this case it is plain that Mandel is excludable under Section 212(a)(28)(D) and (G)(v) and appellees have not argued otherwise (J. App. 8a). Instead, as against the firmly established principle that Congress has exclusive control over the admission of aliens, appellees contend that although an excludable alien cannot force the United States to open its doors, appellees can because they have a "right" under the First Amendment to hear such an alien in person in the United States; they argue therefore that Section 212(a)(28) of the Immigration and Nationality Act of 1952 is unconstitutional because it bars the entry of Mandel and other aliens whom they may wish to confront face-to-face. We submit that this case is governed by the long line of prior decisions of this Court, which we have cited above, see pp. 20-21, *supra*, and that the First Amendment's guarantee of

"freedom of speech" does not, and was never intended to, permit individuals in the United States to compel the entry of otherwise excludable aliens, including Mandel, against the decision of Congress.

In *United States ex rel. Turner v. Williams*, 194 U.S. 279, an alien who had entered the country illegally was excluded under the Act of March 3, 1903, 32 Stat. 1213, 1214,³⁰ as an anarchist. This Court held that even if the alien could be considered an anarchist only in the philosophical sense,³¹ he was nevertheless barred from entry because Congress had found that such aliens "would be undesirable additions to our population, whether permanently or temporarily." 194 U.S. at 294. The decision to exclude foreigners and the terms and conditions for permitting them to enter are not matters for judicial inquiry, but are entrusted exclusively to Congress. 194 U.S. at 290-291. The Court rejected Turner's First Amendment challenge to the Act despite the obvious truth "that if an alien is not permitted to enter this country * * * he is in fact cut off from worshipping or speaking or publishing or petitioning in this country * * *." 194 U.S. at 292.

Harisiades v. Shaughnessy, 342 U.S. 580, although involving deportation of an alien on the basis of his prior association with the Communist Party, is also quite apposite; plainly Congress can exclude at the

³⁰ See p. 15, *supra*.

³¹ During his 10 days in the country, Turner gave at least one lecture advocating a revolt by the workers. 194 U.S. at 282-283.

outset aliens that it can require to be expelled after entry. In sustaining the deportation order in *Harisiades*, the Court recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," 342 U.S. at 588-589.³² Congress, "in exercising the wide discretion that it alone has in these matters," decided in the Alien Registration Act of 1940, 54 Stat. 670—a forerunner of the statute at issue in this case³³—that former members of the Communist Party should not enjoy the hospitality of this country. 342 U.S. at 595-596. The Court held that the First Amendment did not bar deportation of such aliens and that

However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers. [*Id.* at 591.]

In his concurring opinion in *Harisiades*, Mr. Justice Frankfurter pointed out that "[e]ver since na-

³² See Henkin, *The Treaty Makers and the Law Makers: the Law of the Land and Foreign Relations*, 107 U. Pa. L. Rev. 903, 917-922 (1959).

³³ See pp. 16 to 17, *supra*.

tional States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State" and that United States immigration policy "has been a political policy, belonging to the political branch of the Government wholly outside the concern and competence of the Judiciary." 342 U.S. at 596.

Galvan v. Press, 347 U.S. 522, also involved deportation of an alien who had formerly belonged to the Communist Party. The Court found that Congress had a basis for denying alien communists permission to stay in the United States. It pointed to Congress' extensive investigation, which resulted in many findings, including the finding in Section 2(1) of the Internal Security Act of 1950, 64 Stat. 987 (Section 22 of which is the direct source of the statute here at issue),³⁴ that the

Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship.

347 U.S. at 529. Noting that Congress' power over the admission of aliens touches "basic aspects of national sovereignty, more particularly our foreign relations and the national security," 347 U.S. at 530, the Court upheld the alien's deportation. The Court

³⁴ See pp. 16-17, *supra*.

refused to depart from the "unbroken rule of this Court" and find a constitutional violation in Congress' determination, especially since "those who have been most zealous in protecting civil liberties under the Constitution" had never done so. 347 U.S. at 531-532. See *Bugajewitz v. Adams*, 228 U.S. 585, 591 (Mr. Justice Holmes: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful"); *Ng Fung Ho v. White*, 259 U.S. 276, 280 (Mr. Justice Brandeis: "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful").

These decisions, as well as the others we have cited above, see pp. 20 to 21, *supra*, control this case. The situation in *Turner* is nearly identical to the situation here;³⁵ in *Harisiades* and *Galvan*, the Court up-

³⁵ The district court refused to follow *Turner* because in *Harisiades* the "Court did not rely upon *Turner* (which was cited to it) nor invoke the argument (made to it) that the power to expel aliens is an attribute of sovereignty essentially relating to foreign affairs and national safety and, therefore, not restricted impliedly by provisions of the Constitution which do not expressly relate to it" (J. App. 15a).

But this Court's failure to cite one of a host of decisions cited to it in *Harisiades* (see Brief for the Government in that case), all of which recognize Congress' plenary power, is of no significance. Congress' exclusive control over what class of aliens should be allowed to enter the United States has been affirmed, without exception, after the *Harisiades* decision, see, e.g., *Galvan v. Press*, *supra*; *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123, and only last Term this Court cited *Turner* as an example of Congress' broad authority in this area. *Graham v. Richardson*, 403 U.S. 365, 377. The continuing validity of *Turner* has not been undercut.

held deportation of aliens who formerly had been Communists; and in *Galvan*, the Court expressly sustained the constitutionality of Section 22 of the Internal Security Act of 1950; the direct predecessor of the very provision here at issue. (See p. 17, *supra*.)

These cases cannot be distinguished, as appellees propose, on the basis that here the alien's exclusion will prevent them from hearing him in person in this country. That is the obvious consequence anytime any alien is denied entry. It is absurd to suppose that the Court was not astute enough to recognize this self-evident proposition or that it would have decided any of these cases differently if only someone in this country had come forward and asserted his desire to meet the alien face-to-face on American soil.³⁶

Nor are these cases distinguishable on the basis that Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, which disqualified Mandel from eligibility for a visa, impermissibly takes account of the alien's political philosophy. The statute upheld in *Turner* barred the entry

³⁶ Indeed, the alien in *Turner* had already given one lecture during his illegal sojourn in this country, see note 31, *supra*; unless no one attended, which is most unlikely, it is safe to assume that there were people here who desired to hear him. Yet the Court reaffirmed Congress' plenary power to exclude aliens and, in so doing, stated the obvious: "if an alien is not permitted to enter this country * * * he is in fact cut off from * * * speaking * * * in the country," 194 U.S. at 292.

of aliens who were philosophical anarchists. See also *Ex parte Caminita*, 291 Fed. 913, 915 (S.D.N.Y.) (L. Hand, J.). And the portion of the Internal Security Act of 1950 upheld in *Galvan*, rendered aliens ineligible to come to or stay in the United States even if they had only been past members of the Communist Party. See also *Harisiades v. Shaughnessy*, 342 U.S. 580, 595:

Thus, as stated above, in our view these decisions are controlling. "Questions in their nature political," Mr. Chief Justice Marshall stated in *Marbury v. Madison*, 1 Cranch 137, 170, "can never be made in this court." And there is nothing in the First Amendment that requires a departure from the constitutional principle, laid down by this Court and affirmed many times for nearly one hundred years, that Congress has the exclusive power to determine which aliens are to be welcomed and that these are matters "wholly outside the concern and competence of the Judiciary."³⁷ "Freedom of speech" does not carry with it freedom to bring an alien into this country.

³⁷ *Harisiades v. Shaughnessy*, *supra*, 342 U.S. at 596 (Mr. Justice Frankfurter, concurring).

D. *The First Amendment's Guarantee of Freedom of Speech Does Not Include the Right To Bring an Otherwise Excludable Alien Into This Country*

1. *In exercising its plenary power in Section 212 (a) (28) (D) and (G) (v) to make rules for the admission of aliens, Congress did not restrain the freedom of speech of people in this country, but instead restricted only action—the action of the alien in coming into this country*

In *Zemel v. Rusk*, 381 U.S. 1, the Department of State refused to validate the passport of an American citizen for travel to Cuba. Rejecting the "contention of appellant that it is a First Amendment right which is involved," the Court observed that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U.S. at 16-17. "The right to speak * * * does not carry with it the unrestrained right to gather information." *Id.* Significantly, the Court did not say that for purposes of the First Amendment appellant's interest in gathering information in Cuba must be weighed against the government's interest in precluding him from going there. The Court held instead that the First Amendment simply was not involved at all because any inhibition resulting from the refusal to validate passports was an inhibition on action.

Nor is there a First Amendment right involved in this case. In *Zemel* the restriction on travel to Cuba did not impinge on or regulate the freedom of speech of people in this country; they were in no way restrained from discussing Cuban policies or holding certain beliefs about Cuba. Similarly, the

restriction on Mandel's coming to the United States does not abridge appellees' freedom of speech; Section 212(a) (28) (D) and (G) (v) in no way restrains or inhibits them from speaking or publishing.

That statute is directed at controlling the entry of aliens. What appellees have said or written, the people they have associated with and the organizations they have joined, are all irrelevant. The restriction in this case is solely on Mandel's travelling to the United States; it is Mandel's action that is being curtailed. And if, as this Court held in *Zemel*, a limitation on an American citizen's travelling to a foreign country does not deprive him of any right under the First Amendment, still less does restricting the action of an alien by precluding him from entering the country abridge the "freedom of speech" of persons here.³⁸ In both cases, action not speech is being regulated; in neither case is there any infringement on freedom of expression.³⁹

³⁸ See Emerson, *Toward a General Theory of the First Amendment* 101 n. 44 (1966) ("The principles [advocated by Professor Emerson] do not fully apply, of course, to the admission of aliens, since they are not yet members of our society. Here the First Amendment would seem to guarantee no protection. The policy which should be adopted on admission of aliens is another matter."). See also *id.* at 88.

³⁹ *Aptheker v. Secretary of State*, 378 U.S. 500, where the Court found unconstitutional in violation of the Fifth Amendment a statute denying passports to members of the Communist Party in this country, is not to the contrary. The Court there held that the statute was overbroad because it did not distinguish between knowing and unknowing members of the Party or their degree of participation in Party activities. 378 U.S. at 510.

[Footnote continued on Page 31]

Similar situations abound. Thus, citizens may wish to inform themselves of prison conditions, but they have no First Amendment right to demand release of a prisoner in order to meet him face-to-face. People here may desire more information about the activities of our military operations abroad, but they have no First Amendment right to require the return of a serviceman stationed overseas. Persons in this country may wish to explore the subjects of polygamy or prostitution or begging or recidivism, but they have no First Amendment right to compel the admission of aliens who are polygamists or prostitutes or beggars or recidivists.⁴⁰ And we submit that appellees' desire to inform themselves further about Mandel's Marxist philosophy gives them no First Amend-

³⁹ [Continued]

As appellees recognize, however, Mandel has no right to enter this country. Since he obviously has no right of travel under the Fifth Amendment, he cannot complain that Section 212(a) (28) is overbroad and appellees cannot raise that claim on his behalf.

United States v. Robel, 389 U.S. 258, is also inapposite. There the Court held that a statute denying members of the Communist Party employment in defense plants violated the First Amendment because such a broad classification deterred associations that were protected under the First Amendment. With respect to Mandel, of course, *Robel* has no application because, as an alien residing in a foreign country, he has no right to freedom of speech or association here. And with respect to the other appellees, *Robel* is also inapplicable because the exclusion of Mandel and other aliens under Section 212(a) (28) in no way deters appellees from joining whatever organizations they wish or from speaking about or publishing whatever they please.

⁴⁰ These classes of aliens are ineligible for visas. See 8 U.S.C. 1182(a) (8), (10), (11) and (12).

ment right to compel his admission into the United States.

As in all of the foregoing examples dealing with aliens or other persons seeking to travel to a potential audience, under Section 212(a)(28) the reason why the alien seeks entry is immaterial. He is excluded regardless of whether he wishes to come for business or for pleasure or to give lectures. On the other hand, if as appellees argue, his admission to the United States should depend upon whether he has an audience waiting here, then the power to decide what aliens should enter the country is transferred to any individual citizen or group of citizens who might claim that they would like to confront the alien in person, whether temporarily or permanently. As *Zemel* indicates, the First Amendment cannot be relied upon to support such a result.⁴¹

This is why *Lamont v. Postmaster General*, 381 U.S. 301, decided shortly after *Zemel*; is inapposite. Under the procedure at issue in *Lamont*, the Post Office detained foreign mailings of "communist political propaganda" until the addressee returned a card re-

⁴¹ The college speaker-ban cases, such as *Brooks v. Auburn University*, 412 F.2d 1171 (C.A. 5), are thus not in point. Those cases do not hold that when, as in this case, the potential speaker has no right to travel to his audience, the First Amendment nevertheless requires that he be permitted to do so because people would like to hear him in person. Instead, those cases deal with regulations impinging upon freedom of speech in areas where speakers within the country traditionally have a right to be—the campus of public universities. See Van Alstyne, *Political Speakers At State Universities*, 111 U.Pa.L.Rev. 328, 338-339 (1963).

questing delivery of the material. The Court rested its decision "on the narrow ground" that imposing this affirmative obligation on addressees had a "deterrent effect, especially as respects those who have sensitive positions" and would likely inhibit people in sending for such literature.⁴² 381 U.S. at 307. Unlike *Lamont*, appellees in this case are not deterred from expressing their views or inhibited from holding whatever beliefs they please. The regulation in question is directed at the admission of aliens; action, not speech, is being regulated; and the action is that of an alien. In short, freedom to compel the admission of an alien whom Congress has determined to be ineligible for entry is not comprehended within the guarantee of "freedom of speech."⁴³ Appellees' argu-

⁴² Mr. Justice Brennan concurred on the basis that "the protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful" and that "the right to receive publications is such a fundamental right." 381 U.S. at 308.

⁴³ To hold otherwise would be to say that during the nearly one hundred years in which this Court has repeatedly upheld Congress' exclusive authority to determine whether to exclude aliens, the guarantees of the First Amendment have not been fully meaningful. If anything, technological developments over the years have minimized whatever impact exclusion of an alien might have had on his ability to get his views aired in this country. Mandel, for example, tape recorded his speech entitled *Revolutionary Strategy In the Imperialist Countries*, which he intended to deliver during his visit here, and had the speech presented to an audience in New York (App. 5). He also addressed the audience through a trans-Atlantic telephone hook-up (App. 30). Moreover, books and articles written by Mandel and

ment that excluding Mandel prevents him from speaking here in person and thus prevents appellees from hearing him in person is precisely the kind of argument this Court had in mind in *Zemel* when it said that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U.S. at 16-17.

In sum, the prior decisions of this Court sustaining Congress' plenary power to control the admission of aliens; the Court's repeated holdings that these are not matters for judicial inquiry but are entrusted exclusively to the political branches of government; the impossibility of distinguishing these decisions on the basis that here exclusion has the effect of preventing people in this country from meeting the alien in person; the fact that Section 212(a)(28) regulates the action of an alien and does not restrain people here from speaking or publishing or organizing or believing in whatever they please—all this leads to the conclusion that the guarantee of "freedom of speech" in the First Amendment does not mean that a person in this country can require the admission of an alien, such as Mandel, whom Congress has determined to be ineligible for admission to the United States.

others on the topic of Marxism are freely sold and distributed within this country both for private use and for study within many universities (App. 54, 87). "Teachers and students [within this country] * * * remain free to inquire, to study and to evaluate" the merits of these teachings. *Sweezy v. New Hampshire*, 354 U.S. 234, 250.

2. Section 212(a) (28) (D) and (G) (v), which rests upon considerations of foreign policy and national security, represents a legitimate exercise of Congress' exclusive authority to decide what aliens should be entitled to the hospitality of this country and can be revised only by international diplomacy or new legislation.

The district court, however, disregarded this Court's prior decisions and refused to recognize that Section 212(a) (28) is directed at the action of an alien because (J. App. 13a-14a)

there is not here any distinct aim of the exercise of * * * [the power to exclude aliens] that is primary and to the attainment of which the restraint of First Amendment interests is sacrificed in a secondary or mediating exercise of [that] power.

Apparently the court meant, as it stated later in the opinion, that the provisions at issue "do not reflect a genuine exercise of the implied power of alien exclusion" (J. App. 26a).

To the contrary, when Congress barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism" in 1950⁴ and carried these provisions forward in Section 212(a) (28) (D) and (G) (v) of the Immigration and Nationality Act of 1952, it in fact performed a function entrusted solely to the political branches of government, a function touching "basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan v. Press*, *supra*, 347 U.S. at 530. These very provisions are an

⁴ Internal Security Act of 1950, 64 Stat. 987.

expression of the foreign policy of the United States⁴⁵ and are also based on considerations of national security.

There can be no doubt that here, as elsewhere in laws regarding the admission of aliens,⁴⁶ Section 212 (a) (28) (D) and (G) (v) "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades v. Shaughnessy*, *supra*, 342 U.S. at 588-589.⁴⁷ Section 212(a) (28)⁴⁸ manifests to the rest of the international community this country's opposition to the world communist movement and continues to serve as a lever for negotiating with other nations reciprocal privileges for American citizens. Indeed, opponents of this provision based their disapproval on the "delicate problems in the conduct of foreign relations", that, in their view, would result, particularly with respect to Spain, Argentina and Yugoslavia.⁴⁹

⁴⁵ See authorities cited at p. 20, *supra*; see also Kingsley, *Immigration and Our Foreign Policy Objectives*, 21 Law and Contemporary Problems 299 (1956).

⁴⁶ See authorities cited in note 28, *supra*.

⁴⁷ See also cases cited at pp. 20 to 21, *supra*.

⁴⁸ See also 8 U.S.C. 1182(a) (27).

⁴⁹ S. Rep. No. 2369, Part 2, 81st Cong., 2d Sess. 1, 15 (1950) (Minority Report):

Presumably, the interests of the United States require that Spanish and Argentine nationals be permitted to enter the United States for the usual purposes. To forbid it, will create much ill will and invite swift retaliation.

It should be realized that these provisions would rigidly exclude from the United States all Yugoslav

If the foreign policy represented by Section 212(a) (28) is to be changed, this is a task for the political branches of government, either through revision of the immigration laws or through international diplomacy.⁵⁰ As Mr. Justice Jackson said for the Court in *Harisiades, supra*, 342 U.S. at 591, "[i]t should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal^[51] without obtaining for American citizens abroad any reciprocal privileges or immunities."

Moreover, considerations of national defense also entered into Congress' decision to bar the entry of aliens within Section 212(a)(28). Congress had found, after years of investigation, that communism represented a world-wide revolutionary movement designed to establish a totalitarian dictatorship through espionage, deceit and treachery. See p. 25, *supra*; S. Rep. No. 1515, 81st Cong., 2d Sess. 781-801 (1950).

nationals supporting the Tito regime. The independent policy of Yugoslavia under Tito is a major barrier to Soviet expansion and aggression in southern Europe. In view of present world political conditions, we believe that it is essential to leave the Secretary of State and the Attorney General with discretionary power to deal with special situations in the interest of the United States.

⁵⁰ A subsequent treaty, of course, supercedes a prior act of Congress. See generally Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 Colum. L. Rev. 1151, 1170 (1956).

⁵¹ See 8 U.S.C. 1253(g), empowering the Secretary of State to discontinue issuing visas to nationals or residents of countries that refuse to accept deportees. This sanction has been invoked with respect to certain Iron Curtain countries. See Gordon & Rosenfield, note 11, *supra*, at 3-56 to 3-57.

In *Galvan* the Court held that in light of these findings Congress was entitled to determine that aliens, because of their past adherence to the doctrines of communism, should not be entitled to the hospitality of the United States. Congress was not limited to refusing admission to only those particular aliens who advocated violent overthrow of the government.⁵² With more than 200 American Consuls throughout the world granting more than three-quarters of a million nonimmigrant visas per year,⁵³ such a limitation might have created intolerable burdens, involving not only difficulties of investigation and proof, but also delicate foreign relations questions about the propriety of the United States investigating citizens of a foreign country in their homeland. "Congress, exercising the wide discretion that it alone has in these matters, declined to accept that as the Government's burden." *Harisiades, supra*, 342 U.S. at 596.⁵⁴

In light of the foreign relations and national defense policies that Section 212(a)(28)(D) and (G)(v) embodies, the district court erred in holding that Congress had not genuinely exercised its plenary power to exclude aliens. As this Court has held from the beginning, these are matters that the Constitution entrusts to Congress, not the courts. Even if a rational basis were needed to sustain its action, here

⁵² Compare *United States v. Robel*, 389 U.S. 258, 265-266.

⁵³ Gordon & Rosenfield, note 11, *supra*, at 1-69, 3-65.

⁵⁴ Cf. *Zemel v. Rusk, supra*, 381 U.S. at 17 ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas").

Congress had ample justification for excluding aliens within the class to which Mandel belongs. Whether a particular legislative exception should be made for Mandel⁵⁵ or, indeed, whether a general revision of Section 212(a)(28) should be undertaken in light of international developments, are matters for Congress to determine. The First Amendment's guarantee of freedom of speech does not include the power to require the admission of an alien Congress has refused to admit and it does not confer authority on appellees to determine which aliens should enter the country.

⁵⁵ See, e.g., Report to the Senate Committee on the Judiciary of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, *Visa Procedures of Department of State*, 87th Cong., 2d Sess. (Committee Print, 1962); Priv. L. No. 380, 68 Stat. A57 (1954) (private bill granting asylum to Communist aviator who flew his plane to the West).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1972.

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IN THE
Supreme Court of the United States s.

OCTOBER TERM, 1971

No. 71-16

FILED

APR 4 1972

MICHAEL RODAK, JR., CLERK

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIFF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
AS AMICUS CURIAE

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The First Amendment's Guarantee of Freedom of Speech Includes the Right To Hear and Is for the Benefit of the Listener As Well As of the Speaker	8
II. A Statute Which Bans the Advocacy, Without More of "the Economic International, and Governmental Doctrines of World Communism" and the Writing and Publishing of Such Doctrines" Is in Violation of the First Amendment as a Law Which Abridges the Freedom of Speech	10
III. The Fact that the Denial of Freedom of Speech Is Effected by Denying the Speaker Access to His Audience Is no Less an Abridgement of Freedom of Speech Because the Prohibition Is Accomplished by Excluding the Speaker As an Alien from Entering the United States	13
IV. Formulation of Policies Regarding the Rights of Aliens To Enter and To Remain in the United States Is Like All Congressional Powers Subject to the Restraints of the Constitution and Is Sub- ject To Review by the Judiciary	15
V. The Rights of Aliens To Enter and To Remain in the United States Warrant Reexamination by This Court in View of the Doubt As to the Con- tinuing Validity of <i>The Chinese Exclusion Case</i> and <i>Fong Yue Ting</i>	18
CONCLUSION	22

TABLE OF CITATIONS

<i>Cases:</i>	<u>Page</u>
Abington School District v. Schempp, 374 U.S. 203 (1963)	9
Afroyim v. Rusk, 387 U.S. 253 (1967)	18
American Communications Association v. Douds, 339 U.S. 382 (1950)	11, 20
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	14, 20
Baggett v. Bullitt, 377 U.S. 360 (1963)	20
Baker v. Carr, 369 U.S. 186 (1962)	19
Brandenburg v. Ohio, 395 U.S. 444 (1969)	14
Brown v. Board of Education, 347 U.S. 483 (1954)	22
Cantwell v. Connecticut, 310 U.S. 296 (1939)	20
The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1888)	15, 17, 18, 21
Data Processing Service v. Camp, 397 U.S. 150 (1970)	9
DeGeofroy v. Riggs, 133 U.S. 258 (1890)	16
De Jonge v. Oregon, 299 U.S. 353 (1937)	14
Denms v. United States, 341 U.S. 495 (1951)	10, 19
Fong Yue Ting v. United States, 149 U.S. 698 (1893)	16, 17, 18, 21
Galvan v. Press, 347 U.S. 522 (1954)	17, 20
Garrison v. Louisiana, 379 U.S. 64 (1964)	12
Griswold v. Connecticut, 381 U.S. 479 (1965)	8
Hamilton v. Kentucky Distilleries and Warehouse Co., 251 U.S. 155 (1919)	16, 20
Harisiades v. Shaughnessy, 342 U.S. 580 (1952)	17, 18, 19
Kent v. Dulles, 357 U.S. 116 (1958)	14
Keyishian v. Board of Regents, 385 U.S. 589 (1960)	11
Kunz v. New York, 340 U.S. 190 (1951)	11
Lamont v. Postmaster General, 381 U.S. 301 (1965)	8
Martin v. City of Struthers, 319 U.S. 141 (1943)	8
Missouri v. Holland, 252 U.S. 416 (1920)	16
New York Times v. Sullivan, 376 U.S. 254 (1964)	12

(iii)

	<u>Page</u>
New York Trust Co. v. Eisner, 256 U.S. 345 (1922)	21
Noto v. United States, 367 U.S. 290 (1961)	10
Perez v. Brownell, 356 U.S. 44 (1957)	18
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	8
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969)	12
Schenck v. United States, 249 U.S. 47 (1919)	10
Schneider v. Rusk, 377 U.S. 163 (1964)	18
Schneider v. State, 308 U.S. 147 (1939)	20
Shelton v. Tucker, 364 U.S. 479 (1960)	11
Speiser v. Randall, 357 U.S. 513 (1958)	11
Stanley v. Georgia, 394 U.S. 557 (1968)	8
Stromberg v. California, 283 U.S. 359 (1931)	14
Sweezy v. New Hampshire, 354 U.S. 234 (1956)	9, 11
Thomas v. Collins, 323 U.S. 516 (1945)	8
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	12
United States ex rel. Turner v. Williams, 194 U.S. 279 (1904)	17
United States v. O'Brien, 391 U.S. 367 (1968)	14
United States v. Robel, 389 U.S. 258 (1967)	13, 14, 16, 19
United States v. Schwimmer, 279 U.S. 644 (1929)	13
Wieman v. Updegraff, 344 U.S. 183 (1952)	11
Winters v. New York, 333 U.S. 507 (1948)	8
Yates v. United States, 354 U.S. 298 (1957)	13, 14
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	16
Zemel v. Rusk, 381 U.S. 1 (1965)	14

Constitution and Statutes:

United States Constitution, First Amendment *passim*

Act of May 5, 1892, 27 Stat. 25 16

Immigration and Nationality Act of 1952:

Section 212(a)(28)(D), 8 U.S.C. Section 1182(a)(28)(D) 3, 4, 5, 12

Section 212(a)(28), 8 U.S.C. Section 1182(a)(28) . . . 4, 10, 11, 20

Section 212(d)(3)(A), 8 U.S.C. Section 1182(d)(3)(A) 6

Section 212(a)(28)(G)(v), 8 U.S.C. Section 1182
(a)(28)(G)(v) 3, 4, 5, 6, 12

Miscellaneous:

Cahn, "The Firstness of the First Amendment"
65 Yale L.J. 464 (1956) 12

Meiklejohn, "The First Amendment is an Absolute,"
1961 Sup. Ct. Rev. 245 12

IN THE

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OCTOBER TERM, 1971

No. 71-16,

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIFF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK,

Appellées.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMERICAN CIVIL LIBERTIES UNION
AS AMICUS CURIAE

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of the Court, pursuant to Rule 42 of the Rules of this Court.

STATEMENT OF INTEREST

The American Civil Liberties Union has included among its purposes, since its formation in 1920, the object to maintain and advance civil liberties including the freedom of association, press and speech for all people throughout the United States.

In implementation of this purpose, the American Civil Liberties Union has deplored the practice of the United States of denying visas to aliens who wish to express their opinions before the American public. In the view of the American Civil Liberties Union, this practice constitutes an interference with the right of the American people to hear all views and to form their own judgments.

The issue presented by this appeal is whether a statute which bars aliens from the United States upon the basis of their advocacy of proscribed views is unconstitutional upon the ground that it deprives American citizens of freedom of speech.

The American Civil Liberties Union believes that the statute is in conflict with the First Amendment's proscription that "Congress shall make no law . . . abridging the freedom of speech . . .". This brief is submitted in an effort to assist the Court in its analysis of the applicability of the First Amendment to a statute which, although directed to the exclusion of aliens from our borders, affects the rights of persons within the United States.

JURISDICTION

The judgment of the three-judge district court (J. App. 60a) was entered on April 13, 1971. The notice of appeal (J. App 62a) was filed on May 3, 1971. On May 11, 1971, the district court granted a stay of its judgment until June 10, 1971 (App. 92) and on June 10, 1971, granted a further stay (App. 93) pending decision on appeal. This Court noted probable jurisdiction on January 10, 1972 (App. 94). The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(28)(D) and (G)(v)), which provide that certain aliens shall be excluded from entry into the United States are unconstitutional on the ground that they deprive American citizens, who wish to hear in person an alien excluded under those provisions, of freedom of speech under the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 212(a) of the Immigration and Nationality Act of 1952 provides in pertinent part:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * * * *

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship * * *

* * * * *

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching * * * (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

* * * * *

STATEMENT

American appellees are each citizens of the United States and members of the faculty of a college or university: Norman Birnbaum, Department of Anthropology-Sociology, Amherst College; Noah Chomsky, Department of Linguistics, Massachusetts Institute of Technology; Richard A. Falk, Center of International Studies, Princeton University; Robert L. Heilbroner, Department of Economics, New School for Social Research; Wassily Leontiff, Department of Economics, Harvard University; Louis Menashe and David Mermelstein, Department of Social Sciences, Polytechnic Institute of Brooklyn, and Robert Paul Wolff, Department of Philosophy, Columbia University (App. 7, 23-24).

They and others invited Ernest Mandel, a Belgian citizen residing in Brussels and "an internationally noted Marxian scholar and economist", to participate in a series of lectures.

panel discussions, seminars, and other interchanges within the academic community. These included a conference sponsored by Stanford University and its Graduate Student Association in which Mandel was to participate in a debate and panel discussion with John Kenneth Galbraith on the subject: "Technology and the Third World"; two colloquia sponsored by the Department of Philosophy at Princeton University, a conference at Town Hall in New York, sponsored by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference on the theme "Agencies of Social Change: Towards a Revolutionary Strategy for Advanced Industrial Countries"; a seminar conducted by the Department of Anthropology-Sociology at Amherst College; a conference at Massachusetts Institute of Technology sponsored by two groups of undergraduate and graduate students on "Social and Economic Conversion" on panels with John Kenneth Galbraith, Samuel Bowles, Noah Chomsky, S. F. Luria, Seymour Melman, J. P. Neilands, Daniel P. Moynihan, Kenneth Cockrel, Harvey Swados, and Susan Sontag; a lecture sponsored by the Graduate Faculty of the New School for Social Research; a conference at Vassar College; and participation in a discussion with the Department of Philosophy at Columbia University (App. 23-39).

To fulfill these engagements, Mandel applied for a non-immigrant visa to make a "temporary visit to the United States" (App. 68-70). The American consul in Brussels found that he was ineligible to receive a visa by reason of Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v), which forbids visas to aliens who "advocate the economic, international and governmental doctrines of World communism" and "who write or publish any written or printed matter . . . advocating or teaching . . ." such doctrines (App. 13).

However, pursuant to the authority vested by Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(d)(3)(A), the Secretary of State, acting through the Visa Office, recommended that the Attorney General waive Mr. Mandel's ineligibility for a visa "in the interest of free expression of opinion and exchange of ideas" (App. 48-49). The Immigration and Naturalization Service (acting for the Attorney General) determined that the "waiver was not warranted", (App. 48-49). A visa was refused to Mandel (App. 68). As a result, his arrangements to participate in the various academic events in the United States were cancelled, but he nonetheless delivered through a transatlantic telephone hook-up, his scheduled speech at the Town Hall in New York on "Revolutionary Strategy in Imperialist Countries" (App. 30, 55-66).

SUMMARY OF ARGUMENT

I. The decision below is proper and should be affirmed in order to implement the rights of persons within the United States to engage in academic interchange with scholars abroad regardless of the doctrines espoused. The American appellees have both the standing to assert this right, and a legal interest in the protection which the First Amendment gives to hear speech as well as to make it.

II. Nor does it affect the competence of this Court to determine this question because the intended speaker is an alien who is being excluded from the United States pursuant to an act of Congress. The power to exclude persons can be no greater than the power to exclude books or transoceanic communications, if the sole basis of the exclusion is the advocacy of an idea. An abridgment of free speech is not less an abridgment if Congress chooses to exclude the person who is to engage in academic interchange from the United States, his books, or his telephone conversation.

III. The decisions of this Court involving challenges to deportation and exclusion laws by aliens are not controlling here because the rights being asserted here are by citizens' of the United States on their own behalf. Even so, those decisions, while granting virtually complete deference to the laws of Congress, have nonetheless scrutinized constitutional claims raised by aliens claiming the protection of the Constitution. To the extent that there are pages and even a volume of history which have permitted the Congress to adopt legislation which denies substantial due process to aliens who seek to enter and to remain in the United States, these cases should be re-examined in the light of the limitations which the Constitution imposes upon Congress in regulating speech, in making racial classifications, and in denying substantial due process to aliens in our midst and knocking at our doors.

ARGUMENT

Appellants' major, indeed sole premise is that this case is governed by an inherent sovereign power, plenary in nature, "deriving from ancient maxims of international law," to exclude aliens, and that it is "entrusted exclusively to the Congress" being "beyond the concern or competence of the Judiciary" (Br. 11).

This view has been repeatedly urged upon this Court, but rarely, if ever, adopted in those terms only, or applied with such a blunderbuss aim. A discrete analysis of the decisions of this Court indicates (1) that the appellants' absolutist doctrine regarding the rights of aliens has not, in fact, been the approach of this Court, and that (2) in any event, it does not bear upon the inhibition imposed upon the Congress by the First Amendment insofar as its laws affect the rights of persons within the United States.

The First Amendment's guarantee of freedom of speech includes the right to hear and is for the benefit of the listener as well as of the speaker.

Appellants have given scant, if any, attention to the settled decisions of this Court which hold "that the Constitution protects the right to receive information and ideas", *Stanley v. Georgia*, 394 U.S. 557, 564 (1968):

"This freedom [of speech and press] . . . necessarily protects the right to receive . . ." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); see *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 307-308, 398, 402, 403 (1965) (Brénnan, J., concurring); cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society."

See also *Thomas v. Collins*, 323 U.S. 516, 534 (1945), invalidating a statute which required labor organizers to register before attempting to exhort workers to join a union as an unconstitutional restraint on "the rights of the workers to hear . . ."

In response to a claim of a governmental obligation to "protect" the public from disconcerting ideas, Justice Jackson observed (Concurring opinion, 323 U.S. at 545):

But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Nor have the appellants taken into account the standing which the appellees have to assert these rights. The language

in *Data Processing Service v. Camp*, 397 U.S. 150, 153-154 (1970) is instructive here. In distinguishing between the "legal interest" and the "standing" to bring an action, the Court declared:

The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question of whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . . that interest, at times, may reflect 'esthetic, conservational and recreational' as well as economic values . . . A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the establishment clause and the free exercise clause. *Abington School District v. Schempp*, 374 U.S. 203.

The standing, as well as the legal interest of the American appellees, are underscored by the decision of this Court in *Sweezy v. New Hampshire*, 354 U.S. 234, 249-252 (1956):

[P]etitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation These are rights which are safeguarded by the Bill of Rights We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which governments should be extremely reticent to tread.

II.

A Statute Which Bans The Advocacy, Without More Of "The Economic, International, And Governmental Doctrines Of World Communism And The Writing And Publishing Of Such Doctrines" Is In Violation Of The First Amendment As A Law Which Abridges The Freedom Of Speech.

American appellees are university professors who wish to engaged in academic discussions with Mandel and have arranged for his participation in various university programs for such a purpose. They seek his entrance solely as a means by which they may exercise their First Amendment rights. Section 212(a)(28) has been broadly framed by the Congress to protect the internal security of this nation from the threat posed by the advocacy of the doctrines espoused by Appellee Mandel and which American appellees wish to hear.

Since *Schenck v. United States*, 249 U.S. 47 (1919), this Court has consistently recognized First Amendment limitations upon the power of the Congress to legislate in the area of national security. In *Dennis v. United States*, 341 U.S. 495 (1951) this Court acknowledged that:

[T]hroughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken. 341 U.S. at 545 (Mr. Justice Frankfurter concurring).

In *Noto v. United States*, 367 U.S. 290, 297-98 (1961), the distinction was re-emphasized for:

the mere abstract teaching of communist theory, including the teaching of propriety or even necessity for force and violence is not the same as preparing a group for violent action and steeling it to such action.

When placed against these standards, Section 212(a)(28) on its face is clearly violative of the First Amendment, for it seeks to regulate by exclusion ideas which may not be regu-

lated. Nor can it be asserted, as Appellants have, that Mandel's entrance is action and not speech, therefore beyond the protection of the First Amendment. Such an argument leads to the inevitable conclusion that although the government may not silence the speaker at the podium, it may prevent him from ever reaching the podium. Cf. *Kunz v. New York*, 340 U.S. 190 (1951). The statute here involved will not meet the test of constitutionality developed in *United States v. O'Brien*, 391 U.S. 367 (1968), for the effect on First Amendment freedoms is far from incidental. If there were any legitimate primary interest assertable by the Government necessitating a slight and unavoidable restriction on First Amendment rights, Section 212 (a)(28) could stand. No such showing can be made with respect to the statute for exclusion is based solely upon the doctrines advocated by Mandel. Likewise, assuming the application of the balancing tests suggested by *Speiser v. Randall*, 357 U.S. 513 (1958) and *American Communications Association v. Douds*, 339 U.S. 382 (1950), the governmental interest does not outweigh the loss to appellees of their First Amendment rights.

Involved here is that advocacy and debate basic to the functioning of the American academic system. Over time there has developed a protective attitude toward the important concept of academic freedom of discussion. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1956), the Court stated:

The essentials of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die. 354 U.S. at 234.

See also *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frank-

furter, J., concurring); *Tinker v. Des Moines School District*, 393 U.S. 503, 512 (1969) for decisions of this Court expressing concern for the principle of freedom in education. The government does not possess the power to limit the dissemination of ideas among the peoples of this country with the exception of reasonable limitations as to time, place, circumstances and manner. Free speech is a retained right of the citizens of this country.

By whatever theoretical approach one takes with respect to the degree of freedom encompassed by the First Amendment, it is clear that it was intended that "the freedoms embodied in the First Amendment must always secure paramountcy." James Madison as quoted in Cahn, "The Firstness of the First Amendment," 65 Yale L.J. 464, 473 (1956).

The essence of an informed public is the constant interaction of conflicting viewpoints. Vigorous debate on topical issues serves this end and the public's right of access to diverse ideas must be the touchstone. This right may not be infringed absent the most compelling circumstances. See *Red Lion Broadcasting Company v. F.C.C.*, 395 U.S. 367, 385 (1969). Wide debate on public issues is a prerequisite to an informed and aware citizenry—the very essence of a democratic society. There is a "... profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open ..." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The role free speech plays in our society may be viewed as follows, "[F]or speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See also Meiklejohn, "The First Amendment is an Absolute," 1961 Sup. Ct. Rev. 245. This commitment to robust and uninhibited debate will be sacrificed if Mandel is excluded pursuant to Sections 212(a)(28)(D) and (G)(v). The First Amendment requires at the very least that Mandel not be excluded for the advocacy of abstract Marxist doctrine, no matter how abhorrent that doctrine may be, for:

[I]f there is any principle in that Constitution that more imperatively calls for attachment than any other it is the principle that free thought—not free thought for those who agree with us, but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into as well as to life within this country. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Mr. Justice Brandeis, dissenting).

III.

The Fact That the Denial of Freedom of Speech Is Affected by Denying the Speaker Access to His Audience Is No Less an Abridgement of Freedom of Speech Because the Prohibition Is Accomplished by Excluding the Speaker As an Alien from Entering the United States.

Appellants argue that the Government may exercise its exclusion power under these sections because Mandel has no First Amendment right to enter the country and may therefore be excluded for the advocacy of such doctrines. But, *United States v. Robel*, 389 U.S. 258 (1967) rejected a similar argument as to the right of a subversive to employment in a defense facility. Answering the claim that there was no constitutional right to work in a defense plant, this Court stated:

The operative fact upon which job disability depends is the exercise of the individual's right of association, which is protected by the First Amendment. 389 U.S. at 263.

Similarly here the operative fact upon which the exclusion of Mandel depends is his advocacy of the abstract doctrines of Marxist economics. The direct consequence which flows from his exclusion is to prevent the exercise by the American appellees of their First Amendment right to see, hear and to debate with Mandel in an academic forum. It is Mandel's advocacy of communist doctrine which here is the *sine qua non* of the statute. It is for that reason that

it runs afoul of the First Amendment regardless of whether the method of enforcing the prohibition is to exclude the advocate from the United States. *Yates v. United States*, 354 U.S. 298 (1957); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California*, 283 U.S. 359 (1931); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In the light of these decisions, it is passing strange for the Appellants to argue that "Congress' exclusion of aliens such as Mandel does not implicate any First Amendment rights of appellees" (Br. 12). And it is not even specious to say as appellants do that it is not *speech*, but *action* which is involved (Br. 29-30).

Zemel v. Rusk, 381 U.S. 1, 16-17 (1965), as the court below pointed out (J. App. 27a-28a), distinguished between an area restriction upon the "right to travel", which was based there upon the due process clause, and a denial of a passport to a specific person as a "result of expression or association on his part". Unlike *Kent v. Dulles*, 357 U.S. 116 (1958) and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), this Court observed in *Zemel*, "appellant is not being forced to choose between membership in an organization and freedom to travel."

Zemel is plainly no authority for holding that the denial of a visa to permit Mandel to come to the United States to engage in academic interchange with members of the university community is unprotected action and not protected speech.

But still less is it controlling upon the question raised here by the American appellees: whether the Congressional prohibition against the issuance of a visa to Mandel is a law, within the meaning of the First Amendment, which abridges their right to hear and to debate face-to-face Mandel's views. The "acts" which the American appellees assert are aural and verbal only.

IV

Formulation of Policies Regarding the Rights of Aliens to Enter and to Remain in the United States is Like All Congressional Powers Subject to the Restraints of the Constitution and is Subject to Review by the Judiciary.

Appellants seek to obliterate the First Amendment rights asserted by the American appellees by attempting to transmute the case into one involving merely "the right to bring an otherwise excludable alien into this country" (Br. 29, 23).¹

However, even as limited to the rights which aliens may have under the Constitution, appellants' summation of the many decisions of this Court in this area is more hyperbolic than precise.

While it is true that *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581 (1888), described the power to exclude aliens as "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers" and declared that it is a "power to be exercised exclusively by the political branches of government" (Br. 20), it nonetheless observed that this power together with:

The powers to declare war, make treaties, suppress insurrections, repel invasion, regulate foreign commerce, secure republication governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, *restricted in their exercise by the Constitution itself*. 130 U.S. at 604.

This view of the Powers of Congress, it should be unnecessary to argue, has governed the decisions of the Court

¹ Appellants' reference to Mandel as an "otherwise excludable alien", whatever is meant by that phrase, cannot be taken to mean that the First Amendment is not involved in his exclusion since the denial of the visa is concededly based upon his advocacy of proscribed doctrines, and not "otherwise" (Br. 4-5).

in each of its applications. As to the war power, see *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U.S. 155 (1919); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Robel*, 389 U.S. 258 (1967); as to the treaty power, see *DeGeofroy v. Riggs*, 133 U.S. 258 (1890); *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

As to the exercise of powers dealing with foreign relations or those which are "inherent in sovereignty," the applicable constitutional limitations have either been subsumed in the decisions of this Court or explicitly stated, albeit with results which have often denied substantial claims of aliens.

Thus *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893), a leading decision on the question of the powers of Congress over aliens,² declared:

The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by Act of Congress, and to be executed by the executive authority according to the regulations established, except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene. (emphasis supplied)

As its language indicates, the Court there made no distinction, significant here, between the power to exclude and the power to expel aliens. They " . . . rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." 149 U.S. at 713.

²The Court there sustained [for example] a statute which required the deportation of Chinese laborers lacking a certificate of residence unless they were able to establish lawful residence "by at least one credible white witness"; Act of May 5, 1892, 27 Stat. 25; a decision dubious then, see dissenting opinions, C.J. Fuller, J. Brewer, and J. Field, at 732-64; and clearly inadmissible now.

Although the cases which have been the progeny of *The Chinese Exclusion Case* and of *Fong Yue Ting* have been mixed in their disposition of the constitutional claims of aliens and of citizens whom Congress would make aliens, the challenges of the various statutes have indeed been the "concern . . . of the Judiciary" and have in each case been determined to be within its "competence" to decide Constitutional questions. (Br. 24-25).

United States ex rel. Turner v. Williams, 194 U.S. 279 (1904), while declaring that Turner, an alien ordered excluded from the United States, "cannot assert the rights in general obtaining in a land to which they do not belong" as citizens or otherwise, nonetheless canvassed the record, reviewed the statutory prohibition against the admission of "anarchists, or persons who . . . advocate the overthrow by force and violence of the government of the United States . . . or the assassination of public officials . . .," and found that it could not say ". . . that the inference was unjustifiable . . . that his speeches were incitements to that end". 144 U.S. at 293-294.

It may be, therefore, that Turner, as an alien deemed excluded from the United States, may have had no claim upon the Constitution, but the Court did not eschew "judicial inquiry" nor did it "entrust . . . (the matter) exclusively to Congress (Br. 23), choosing instead to hold, within its own competence, that "as long as human governments endure they cannot be denied the power of self-preservation." By way of underscoring the power of the judiciary to determine the constitutionality of legislation affecting the rights of aliens under the First Amendment, the Court distinguished the Alien and Sedition Law, and cited *The Chinese Exclusion Case* for its observation that ". . . [T]he validity of its provisions was never brought to the test of judicial decision in the courts of the United States." (194 U.S. at 295).

Similarly, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) and *Galvan v. Press*, 347 U.S. 522 (1954), relied upon by

appellants, as being holdings supporting the exclusivity of Congressional power over the rights of aliens to enter and to remain in the United States (Br. 23-25), dealt specifically with the constitutional objections raised.

Although applying to the power to divest citizenship, *Perez v. Brownell*, 356 U.S. 44 (1957); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Afroyim v. Rusk*, 387 U.S. 253 (1967) are relevant because the government in those cases also invoked arguments similar to those here suggesting an "implied attribute of sovereignty" which permits divestiture of citizenship (*Afroyim*, 387 U.S. at 253); and a judicial deference to Congress in the "avoidance of embarrassment in the conduct of foreign relations" (*Schneider v. Rusk*, 377 U.S. at 166).

The short answer, therefore, to the appellants' contention that "Congress has plenary power to control the admission of aliens and that under the Constitution these are matters beyond the concern or competence of the Judiciary" (Br. 11) is that the decisions of this Court do not so hold.

V

The Rights of Aliens to Enter and to Remain in the United States Warrant Reexamination by this Court in View of the Doubt as to the Continuing Validity of *The Chinese Exclusion Case* and *Fong Yue Ting*.

The cutting edge here is not whether this Court may determine whether the First Amendment denies to Congress the power to exclude aliens from the United States because of their views.

It is whether appellee Mandel as an alien, and moreover as an alien seeking entry to this country may challenge the policies which Congress may adopt regarding the rights of aliens to enter and remain in the United States.

From *The Chinese Exclusion Case* to *Harisiades*, it is clear that the decisions of this Court have been posited, upon the

effect which the foreign allegiance of the alien has upon his status with the United States.

Harisiades observes:

So long as one . . . perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international law. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf. . . . The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. 342 U.S. at 585-6.

It is essentially for this reason that this Court has referred to legislation dealing with the rights of aliens as a "political question" "entrusted to the branches of the Government in control of our international relations and treaty-making powers." 342 U.S. at 591.

Baker v. Carr, 369 U.S. 186, 211 (1962) suggests the need for a "discriminating analysis" of the question posed here to determine whether, as to appellee Mandel's challenge of the statute, the issue is so "political" that it cannot be determined by the judiciary.

Plainly the issue to be determined here is no different from that decided in *Dennis v. United States*, 341 U.S. 495 (1951) and no more "political." The question whether aliens can be permitted to enter the United States if they "advocate the economic, international, and governmental doctrines of world Communism" appears no different from similar determinations involving the rights of citizens within the United States to hold such doctrines, or of persons with forbidden views to be employed in defense facilities, *United States v. Nobel*, 389 U.S. 258 (1967), as a radio operator,

American Communications Association v. Douds, 339 U.S. 382 (1950); or a university professor, *Baggett v. Bullitt*, 377 U.S. 360 (1963).

The argument that Section 212 (a)(28) "manifests to the rest of the international community this country's opposition to the world Communist movement and continues to serve as a lever for negotiating with other nations reciprocal privileges for American citizens" (Br. 36) seems scant a basis for distinguishing these decisions. The suppression of all Communist thought within the United States would similarly manifest to the world our opposition to the Communist movement, yet the suppression of ideas would surely not be countenanced by this Court. The suggestion that the statute here is any kind of a lever, even if true, in the light of alternative "levers" which are less restrictive of constitutionally protected freedoms cannot be sustained. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Given a governmental purpose to conduct its foreign relations so as to oppose the world Communist movement, since that "end can be more narrowly achieved" than by forbidding the entry to the United States of its advocates, this method of conducting foreign relations would appear to be denied to Congress under the doctrine set forth in *Schneider v. State*, 308 U.S. 147 (1939), *Cantwell v. Connecticut*, 310 U.S. 296 (1939), and applied with regard to travel in *Aptheker*.

However, the application of this doctrine of the field of alien control may very well require this Court to reexamine the inhibition which was suggested in *Galvan v. Press*, 347 U.S. 522 (1954):

There, Mr. Justice Frankfurter stated:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155, . . . much could be said for the view,

were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens.

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 . . . but a whole volume.

As we have seen, however, that page of history is even more dubious now than it was when written. In the light of at least as many pages and volumes of history written by this Court which have invalidated racial classifications, can it now be said that the underpinnings of *The Chinese Exclusion Case* and of *Fong Yue Ting* are sustainable? A decision which states that "it seems impossible for (Chinese immigrants) to assimilate with our people or to make any change in their habits or modes of living" 130 U.S. at 595, and which upholds the power of Congress to "consider . . . the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . ." 130 U.S. at 606, and to exclude all such aliens from the United States is based upon a racial classification which could not be sustained in determining the rights of such aliens within the United States for any other purpose. Yet in *Fong Yue Ting*, this Court, equating the power to exclude aliens with the power to expel them decided that "Chinese laborers . . . like all other aliens residing in the United States for a shorter or longer time . . . remain subject to the power of Congress to expel them, or order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." 149 U.S. at 713.

It seems especially justifiable for this Court to reexamine these precedential pages of history in view of the fact that they were written before not only "expansion of the concept of substantive due process" as a limitation upon the war power and other related powers of the Congress,

but also before the sharpened awareness of this Court of the invidiousness of racial classifications and, as relevant here, prior to any decision asserting a free speech right under the First Amendment.

If "writing upon a clean slate" this Court would strike down a statute of Congress which required the expulsion, for example, of all aliens who are Jews or black, or who advocate the smoking of tobacco or the practice of birth control, there appears to be no reason not to correct a page of history which should never have been written. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

CONCLUSION

For the reasons advanced, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1971

No. 71-16

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

JOHN M. MITCHELL, Attorney General of the United States,
WILLIAM P. ROGERS, Secretary of State,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY
LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEIL-
BRONER, ROBERT PAUL WOLFF, LOUIS MENASHE,
NOAM CHOMSKY, and RICHARD A. FALK,

Appellees.

On Appeal from the United States District
Court for the Eastern District of New York

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INDEX

	Page
Question Presented	1
Statement of the Case	2
Summary of Argument	11
Argument:	
American Citizens Have A Right Guaranteed By The First Amendment To Meet With An Alien For Free And Open Academic Discussions Which Can- not Be Preempted By The Alien's Exclusion Where No Legitimate Purpose Is Served Thereby	14
1. The First Amendment Protects the Right of American Citizens to Receive Information From and to Hold Academic Meetings with an Alien	18
2. The Statutory Scheme Involved Here Creates a Screening Process for Aliens Classified Under §212(a) (28) (D) and (G) (v) Which Provides for Entry In the Public Interest Under the Waiver Provision, §212(d) (3) (A) and There- fore, On Its Face, Is Consistent With The Re- quirements of the First Amendment	27
3. An Exercise of the Exclusion Power that Un- justifiably Disrupts and Prevents Academic Meetings in this Country Is Subject to Review Under First Amendment Standards at the In- stance of Affected American Citizens	33
Conclusion	38

CITATIONS

Cases:

<i>ACLU v. Radford</i> , 315 F. Supp. 893 (E.D.Va. 1970)	18
<i>Aptheker v. Secretary of State</i> , 378 U.S. 500	36-37
<i>Blount v. Rizzi</i> , 400 U.S. 410	23
<i>Bridges v. Wixon</i> , 326 U.S. 135	33
<i>Brooks v. Auburn University</i> , 412 F.2d 1171 (5th Cir. 1969)	18
<i>Crowell v. Benson</i> , 285 U.S. 22	30
<i>Dennis v. United States</i> , 341 U.S. 494	33
<i>Epperson v. Arkansas</i> , 393 U.S. 97	18
<i>Food Employees v. Logan Plaza</i> , 391 U.S. 308	21
<i>Fong Yue Ting v. United States</i> , 149 U.S. 698	33
<i>Freeman v. Maryland</i> , 380 U.S. 51	23
<i>Galven v. Press</i> , 347 U.S. 522	16, 26, 33, 34
<i>Goldberg v. Kelly</i> , 397 U.S. 254	20
<i>Greene v. McElroy</i> , 360 U.S. 474	30
<i>Griswold v. Connecticut</i> , 381 U.S. 479	18
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233	18
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580	33
<i>Kent v. Dulles</i> , 357 U.S. 116	20, 36-37
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589	19
<i>Lamont v. Postmaster General</i> , 381 U.S. 301	18, 21-22, 36
<i>Lovell v. Griffin</i> , 303 U.S. 444	21
<i>Marsh v. Alabama</i> , 326 U.S. 501	18
<i>Martin v. City of Struthers</i> , 319 U.S. 141	18, 23, 25
<i>Molpus v. Fortune</i> , 432 F.2d 916 (5th Cir. 1970)	18
<i>New York Times Co. v. United States</i> , 403 U.S. 713	18, 26, 35-36
<i>Organization For a Better Austin v. Keefe</i> , 402 U.S. 415	23
<i>Pickings v. Bruce</i> , 430 F.2d 595 (6th Cir. 1970)	18
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367	18, 23, 31, 32
<i>Rowan v. Post Office Dept.</i> , 397 U.S. 728	23
<i>Schneider v. Smith</i> , 390 U.S. 17	30, 35

<i>Shactmant v. Dulles</i> , 225 F.2d 938 (D.C. Cir. 1955)	36
<i>Shelton v. Tucker</i> , 364 U.S. 479	18
<i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147	29
<i>Smith v. University of Tennessee</i> , 300 F.Supp. 777 (E.D. Tenn. 1969)	18
<i>Snyder v. Board of Trustees</i> , 286 F. Supp. 927 (D. Ill. 1968)	18
<i>Stanley v. Georgia</i> , 394 U.S. 557	18
<i>Staub v. City of Baxley</i> , 355 U.S. 313	29
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234	18, 19, 20, 21
<i>Teague v. Regional Commissioner</i> , 404 F.2d 441 (2d Cir. 1968) cert. denied, 394 U.S. 977	23-24, 36
<i>The Chinese Exclusion Case</i> , 130 U.S. 591	33
<i>Tucker v. Texas</i> , 326 U.S. 501	23
<i>Turner v. Williams</i> , 194 U.S. 279	33
<i>United States v. Hiatt</i> , 415 F.2d 664 (5th Cir. 1970), cert. denied, 397 U.S. 936	22
<i>United States v. O'Brien</i> , 391 U.S. 367	16, 17, 25, 34, 35
<i>United States v. Robel</i> , 389 U.S. 258	34-35
<i>United States v. Romley</i> , 345 U.S. 41	30
<i>United States v. Thirty-Seven Photographs</i> , 402 U.S. 363	23, 30
<i>Zemel v. Rusk</i> , 381 U.S. 1	24-26, 35

Constitutional, Statutory and Regulatory Provisions:

United States Constitution:

First Amendment	10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 24, 28, 30, 33, 37, 38
Fifth Amendment	33, 37

Statutes:

Immigration & Nationality Act of 1952:

§101 (a) (15)	6
§101 (a) (15) (B)	15
§101 (a) (15) (H)	6
§101 (a) (40)	10
§212 (a) (27), 8 U.S.C. §1182 (a) (27)	12, 17, 28, 30

IV

§212(a) (28), 8 U.S.C. §1182 (a) (28) . . .	2, 3, 6, 12, 13, 17, 27, 28, 31
§212(a) (28) (D), 8 U.S.C. §1182(a) (28) (D) . . .	2, 10, 16, 19; 27, 28
§212(a) (28) (G) (v), 8 U.S.C. §1182(a) (28) (G) (v)	2, 10, 16, 19, 27, 28
§212(a) (29), 8 U.S.C. §1182(a) (29) . . .	12, 17, 28, 30
§212(d) (3)-(A), 8 U.S.C. §1182(d) (3) (A) . . .	2, 3, 6, 10, 11, 12, 17, 27
§212(d) (6), 8 U.S.C. §1182(d) (6)	31
§212(f), 8 U.S.C. §1182(f)	15
Trading with the Enemy Act, 50 U.S.C. App. §5 (b)	23
Regulations: 8 C.F.R. §212.4(d)	32

Miscellaneous:

Annual Report, 1969, Immigration and Naturaliza- tion Service	32
Biehler, <i>A Handbook of Psychology Applied to the Art of Teaching</i> (1966)	20
Bugelski, <i>The Psychology of Learning Applied to Teaching</i> (2d Ed. 1971)	20
Erickson & Kind, <i>A Comparison of Visual and Oral Presentation</i> , 6 School & Society (1917)	20
Gordon & Rosenfield, <i>Immigration Law and Pro- cedure</i>	27, 31
<i>Hearings Before the President's Commission on Immigration and Naturalization</i> , 82d Cong., 2d Sess. (1953)	20
Heisenberg, <i>Physics and Beyond</i> (1971)	20
Lindgren, <i>Educational Psychology in the Classroom (1967)</i>	20
Mandel, <i>Marxist Economic Theory</i> (1969)	5
Seagoe, <i>The Learning Process</i> (1970)	20
S. Rept. No. 1515, 81st Cong., 2d Sess. (1950)	17
S. Rept. No. 1137, 82d Cong., 2d Sess. (1952)	31

Supreme Court of the United States

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Appellees.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF FOR APPELLEES

QUESTION PRESENTED

DOES APPELLANTS' ACTION IN REFUSING TO
ALLOW AN ALIEN SCHOLAR TO ENTER THE COUN-
TRY TO ATTEND ACADEMIC MEETINGS VIOLATE
THE FIRST AMENDMENT RIGHTS OF AMERICAN
SCHOLARS AND STUDENTS WHO HAD INVITED HIM?

STATEMENT OF THE CASE

Decision Below

This appeal arises from a judgment of a three-judge district court sitting in the Eastern District of New York.

The court held, with one judge dissenting, that, as the principal representatives of the public interest embodied in the First Amendment protection of free academic debate and inquiry, American scholars and students have standing to challenge appellants' refusal to allow an alien scholar to enter the country for the sole purpose of participating in specific academic meetings to which he had been invited. These citizens, the court found, suffered and were continuing to suffer irreparable injury as a direct result of the alien scholar's exclusion, which disrupted numerous of their scheduled academic meetings in 1969, and has prevented such meetings from taking place ever since.

This case concerns the application of two integrally related sections of the Immigration and Nationality Act of 1952 (hereinafter "the Act"). Together these provisions operate as a process for the screening and controlled admission of a class of aliens identified by certain political and social beliefs. The process is initiated under §212(a)(28) and as particularly relates to this case, subsections (D) and (G)(v), 8 U.S.C. §1182(a)(28)(D) and (G)(v). These provisions render an alien ineligible to receive a visa if at any time he has advocated or taught "the economic, international, and governmental doctrines of world communism," or has ever written, published, circulated, distributed or displayed literature containing such advocacy or teaching. Aliens within this class are flatly excluded by this section from entering the country as immigrants seeking permanent resident status. But, as a result of the second section of the Act involved in this case, §212(d)(3)(A), 8 U.S.C. §1182(d)(3)(A), these aliens are *excludable*, but not *peremptorily* excluded with respect to entry as non-immigrants, temporarily and for specific purposes. Thus, as appellants state, "with respect to an alien excludable under

Section 212(a) (28), the Attorney General in his discretion may waive inadmissibility upon approval of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility."¹ (Gov. Br. P. 18). The statistics set forth in appellants' brief reveal that an overwhelming majority of aliens classified as excludable under subsection (a) (28), and who apply for waivers under §212(d) (3) (A) of the Act, are not excluded, but rather are granted waivers and admitted temporarily by appellants. See Gov. Br. p. 18, n. 24.

The court below found these provisions unconstitutional as applied in the circumstances of this case, where the denial of a waiver to Dr. Ernest Mandel, a citizen and resident of Belgium, was unsupported by any legitimate reason and caused the cancellation or disruption of academic meetings sponsored by Americans. As the court stated:

"Here the discretion is limited to the 'waiver' aspect of the statute; the executive is given power to admit temporarily those whom the state declares ineligible. . . . Such an executive discretion to invoke or suspend the operation of the general national power to exclude aliens may exist where the uses of the discretion do not impinge on interests protected by the First Amendment, but that it cannot exist here flows from the nature of the rights involved. In this case the admission of Mandel is but a lever by which the constitutional rights of his prospective audience are to be given effect; they, as the articulately concerned portion of the sovereign people, assert a very high title to support Mandel's admission." (J. App. p. 25a).²

Appellants unquestionably have power to deny a waiver to any alien when they make a finding that exclusion is neces-

1. "Gov. Br." refers to the Brief for Appellants filed herein.

2. "J. App." refers to the appendix to the Jurisdiction Statement; "App." refers to the separate appendix filed herein.

sary for the protection of national security or the effectuation of foreign policy. If that were the case here, the disruption of academic meetings in this country would merely be, as the court below said, "an unsought incident to attaining the end for which the legislative power exists and is exercised." (J. App. 19a). But that is not the case. No such reasons are advanced as the basis for the waiver denial here. There is no claim that Dr. Mandel was excluded because of subversive affiliations or intentions, or because entry or participation in academic meetings would in anyway endanger national security. Nor is there any claim that foreign policy considerations warrant exclusion; that no such claim can be made is confirmed by the finding of the Department of state that a waiver should be granted.

Instead appellants argue that their power is absolute and requires no justification for its exercise. Rejecting this argument as being tantamount to a claim of an unfettered power to censor what Americans have a right to hear, the court held that the exclusion power, like all powers of government, is subject to limitations imposed by the First Amendment. In view of the appellants position, the court was required to apply only the most fundamental principles of First Amendment law in ruling that suppression of speech by and the free flow of information to Americans can be neither the object, nor the unjustified result of an exercise of the exclusion power.

The cases appellants rely on for support were found inapposite by the court below. In none had this Court accepted the claim of "plenary power" as dispositive of its constitutional obligation and authority to determine the legitimacy of an exercise of the exclusion or deportation power. Furthermore, in none had the First Amendment rights of citizens been presented to or considered by this Court. Rather, this case was held to be like so many others in which this Court has been called upon to resolve a conflict between the First Amendment and an exercise of one of government's great powers. In such cases the Court has required the government to show, at least, that the challenged exercise of power served a legitimate inter-

est, and therefore was not, by purpose or effect, a device for censoring debate. Where, as here, the government neither makes nor attempts to make such a showing the decisions of this Court hold that the First Amendment rights of citizens are entitled to enforcement.

The Facts

The record in this case is comprised entirely of undisputed and uncontroverted evidence introduced by appellees; no evidence was offered by appellants.

The citizens who have brought this action represent the numerous scholars, students and other members of the public who had issued invitations to Dr. Mandel, or were to participate in discussions with him or sought to hear and inquire into his ideas. Each of these citizens is a member of the faculty at a major American university and is engaged in scholarly work in one or several fields of the social sciences. Their interest in Dr. Mandel, and the interest of the many other Americans they represent, arises from the fact that he is an internationally known journalist, scholar and economist, and a noted authority and exponent of Marxist economic theory. His two-volume text entitled *Marxist Economic Theory*, published in 1969, has been acclaimed the major contemporary work in its field.

In the spring of 1969, the Graduate Student Association at Stanford University decided to sponsor a conference on "Technology and the Third World" to be held at the university on October 17 and 18 of that year (App. 34). The conference's format involved various major addresses by noted economists, each of which being followed by a discussion "with a panel composed of people with differing views." (*Ibid.*) On August 20, 1969, the sponsors, with express endorsement by the administration of Stanford University, extended an invitation to Dr. Mandel. (App. 33-34) Dr. Mandel was to be a member of the panel to discuss the keynote address by Professor John Kenneth Galbraith of Harvard and to give the major address on the following day, after which Professor Galbraith would

participate in the panel discussion. The invitation was closed as follows:

"We certainly will be honored if you can come. We are prepared to offer you \$1,000 to cover travel and incidentals. Your opinions will provide a contrast to those of Professor Galbraith and others participating." (App. 35)

On September 8, 1969, after accepting the Stanford invitation, Dr. Mandel applied to the American Consulate in Brussels for a nonimmigrant visa, specifying that he sought temporary admission solely for the purpose of attending the conference.³

This application was denied by appellants. Although they were aware of Stanford's interest in Dr. Mandel's visa, appellants made no attempt to notify anyone connected with the University of the visa denial, and in fact, did not notify anyone at all, including Dr. Mandel, until five days after the conference was over. At that time, a representative of the Consulate advised Dr. Mandel by telephone that his application had been rejected. (App. 27)

In a subsequent letter confirming the rejection the Consul advised Dr. Mandel that, since 1962 he has been deemed ineligible to receive a nonimmigrant visa under §212(a)(28) of the Act and that his two prior admissions, in 1962 as a working journalist and in 1968 to fulfill speaking invitations at more than 30 American universities, were based on a waiver of ineligibility pursuant to §212(d)(3)(A).⁴ (App. 14) The

3. Nonimmigrant visas for temporary admission are limited to aliens seeking entry for one of the purposes specified by 8 U.S.C. §1101(a)(15). A request to attend an academic conference falls within the scope of §1101(a)(15)(H). Dr. Mandel sought admission for six days, from October 14 to October 20, so that he would have the personal convenience of two days travel time before and after the conference.

4. A copy of §§212(a)(28) and (d)(3)(A) was attached to the Consul's letter. (App. 14-21) But, the Consul did not specify under which provision the ineligibility finding was made. Nor did the Consul indicate that this finding had ever been reviewed since 1962.

Consul expressly acknowledged that Dr. Mandel had not been "clearly informed, in 1962, of the refusal and subsequent discretionary procedure being followed," but closed without further explanation that the Department of State had refused to recommend the granting of a waiver in connection with his recent application. (*Ibid*)

During this period, numerous other groups of American scholars and students extended invitations to Dr. Mandel. (App. 26-27) At least six received acceptances, including Professor Stuart Hampshire, Chairman of the Department of Philosophy at Princeton University, who sought Dr. Mandel's participation in two seminars (App. 35-36); Professor Norman Birnbaum, Department of Sociology at Amherst College, who requested that he address a seminar and in addition give a lecture to a general college audience (App. 36); and Professor Robert L. Heilbroner, Department of Economics of the New School for Social Research, who invited him to address the graduate faculty. (App. 27, 39). A student organization at the Massachusetts Institute of Technology received an acceptance of its request that Dr. Mandel participate in a two-day conference at the Institute as a member of a panel along with Professors Galbraith, Noam Chomsky of M.I.T., Daniel P. Moynihan of Harvard, Seymour Melman of Columbia, Nobel Laureate, S. E. Luria, writer, Susan Sontag, and lawyer, Kenneth Cockrel. Another group at Vassar College, sponsoring a two-day conference, scheduled Dr. Mandel as a member of a discussion panel along with Andre Gorz, editor of *Les Temps Modernes*, and Professor Herbert Marcuse, of the University of California at San Diego. Dr. Mandel was also chosen as the keynote speaker by the sponsors of the Socialist Scholars Conference, to be held at Town Hall in New York City. (App. 26)

On October 22, 1969, prior to having been advised of the disposition of his earlier application, Dr. Mandel submitted a new application for a nonimmigrant visa, seeking admission for a period approximately from November 25, 1969 to December 8, 1969, specifically and solely for the purpose of fulfilling

the above described speaking commitments.⁵ (App. 44)

The summary denial of Dr. Mandel's visa application for the Stanford Conference triggered concern among the other groups that had anticipated his participation in their academic programs. Counsel for appellees was among several persons contacted by these groups to act as their representatives in seeking an explanation from the Department of State for its action and in obtaining assurances that their meetings with Dr. Mandel would not be prevented.

In response to inquiries, the Administrator of the Bureau of Security and Consular Affairs advised appellees' counsel that the Department of State's decision not to recommend waiver of ineligibility was based on a belief that Dr. Mandel had violated the conditions placed on his admission in 1968. (App. 21) But, as the Administrator stated, the Department was of a different view after further investigation, which revealed

"that in 1962 and 1968 Dr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and his assurances, given in connection with his current [October] application, that he will conform to his stated itinerary and purposes, we are reconsidering his case and are discussing it with the Department of Justice." (App. 22)

Despite repeated requests during November, 1969 by representatives of the American academic groups, who stressed the imminency of their planned meetings as the basis for the need to have information concerning the status of Dr. Mandel's visa application, neither the Department of State nor Department of Justice made any reply.

5. Dr. Mandel attached a proposed itinerary to the application, which set forth his schedule in detail. (App. 46)

But, in a letter dated December 1, 1969 and without prior notice to those whose meetings were scheduled for November, the Consulate informed Dr. Mandel that the Attorney General had refused to grant a waiver recommended by the Department of State. (App. 49) As a result, the meetings scheduled for December, like the November meetings, were abruptly cancelled or were held in Dr. Mandel's absence.⁶ (App. 30)

Subsequently, the Department of State advised the Bertrand Russell Foundation (co-sponsor of the Socialist Scholars Conference) that "... in the interest of free expression of opinion and exchange of ideas, [it had] recommended a waiver for Dr. Mandel. The Immigration and Naturalization Service (acting for the Attorney General) responded that a waiver was not warranted." (App. 48-49)

In response to further inquiries, a representative of the Immigration and Naturalization Service advised appellees' counsel of its view, first, that Dr. Mandel is ineligible for a visa because of his "subversive affiliations" and second, that he is not entitled to a waiver because his activities during the 1968 visit "went far beyond the stated purposes of his trip ... and represented a flagrant abuse of the opportunities afforded him to express his views in this country ..." (App. 68)

Appellants concede the inaccuracy of the first contention⁷ and place no reliance on the second.

Dr. Mandel's visa ineligibility is based solely on his alleged speech and writings advocating or teaching "economic, international and governmental doctrines of world commu-

6. When the sponsors of the Socialist Scholars Conference realized, after waiting to the last moment, that Dr. Mandel would not be permitted to attend, they resorted to the only available alternative and presented the keynote address to the Town Hall audience by tape recording. They also arranged, at great expense, for Dr. Mandel to participate in discussions by trans-Atlantic telephone hook-up. But a circuit-failure prevented this. (App. 51)

7. See appellants' Jurisdictional Statement, p. 3; J. App. 5a.

nism."⁸ (App. 86-87; J. App. 8a)

Appellants' position on the question of whether Dr. Mandel violated his visa conditions in 1962 is that the question is "irrelevant" because "[t]he Attorney General is not required to justify his finding that the applicant should not receive a waiver." (App. 88)

Appellees principal challenge was directed at the application of §§212(a)(28)(D) and (G)(v) and §212(d)(3)(A) to the facts of this case.⁹ Appellees maintained that where their First Amendment rights and those of other citizens are vitally affected by an Executive decision to exclude Dr. Mandel, such decision can not constitutionally be made without any basis or justification; that the statutory provisions involved should not be construed to authorize the arbitrary abridgment of protected interests, and, if so construed, would be unconstitutional as here applied.

The court ruled that "[s]uch executive discretion to invoke or suspend the operation of the general national power to exclude aliens may exist where the uses of discretion do not impinge on interests protected by the First Amendment . . ." (J.

8. We have never conceded that Dr. Mandel has engaged in the advocacy defined by §§101(a)(40) and 212(a)(28)(D) and (G)(v) of the Act. It is and has been our position that these provisions are so vague and uncertain in their meaning and scope that no one can determine who is or is not included. They compass any expression of political, social or economic philosophy that government authorities might disfavor. These provisions therefore were challenged as investing appellants with an unlimited power of censorship over what Americans may hear. (App. 10-12) We do not contest the fact that appellants can and do conclude that Dr. Mandel's Marxist economic philosophy falls within the scope of these vague provisions.

9. In addition to challenging on First and Fifth Amendment grounds, the appellees also sought to restrain their enforcement against Dr. Mandel, because (i) the terminology of §212(a)(28)(D) and (G)(v) was so vague and overbroad and the discretionary power delegated to the Attorney General by §212(d)(3)(A), so unlimited, that these provisions invested appellants with unfettered power to prevent Americans from hearing any expression of political, social, economic, or other intellectual opinion which has not obtained Government approval; (ii) the provisions operate to bar expression of opinions relating only to one side of the spectrum political philosophies; (iii) the provisions fail to provide adequate, or indeed, any procedural safeguards and ascertainable standards; and (iv) there is not a scintilla of evidence to support the findings underlying the Attorney General's refusal to accept the Secretary of State's favorable waiver recommendation.

App. 25a), but "the First Amendment peremptorily forbids equating the implied power to exclude aliens in the interest of national security and the even conduct of international affairs with a power to abridge the freedom of speech, press and peaceable assembly." (J. App. 26a) Finding that appellants had offered nothing to suggest that Dr. Mandel's exclusion served any legitimate interest, whether in the realm of national security, foreign relations or otherwise, the court declared that "[t]he challenged parts of the Act as here applied . . . do not reflect a genuine exercise of the implied power of alien exclusion." (J. App. 26a) A judgment was therefore entered enjoining appellants from "implementing or enforcing §§212(a) (28) and 212(d) (3) (A) . . . so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor." (App. 89)

SUMMARY OF ARGUMENT

This case concerns various, unrelated academic meetings, called by American scholars and students from many of the nations most distinguished universities. These meetings, which included classroom seminars, lectures and large-scale conferences, involved discussions of political, social and economic questions relating to matters of contemporary and historical importance. One of the persons invited to participate in these meetings was Dr. Ernest Mandel, who is a citizen and resident of Belgium. But, without prior warning or any stated reason, appellants refused to grant a waiver under §212(d) (3) (A) of the Act, and barred Dr. Mandel from entering the country temporarily to attend these meetings. As a result of this action many of the scheduled meetings were abruptly cancelled or were held in an abridged format reflecting Dr. Mandel's absence.

The court below ruled that appellants' wholly unjustified refusal to grant a waiver violated the First Amendment rights of the American citizens to hold free and open academic meetings and discussions and to receive uncensored information from diverse and antagonistic sources. These rights, the court

concluded, are of the most fundamental nature, since they ensure the ability of the people to govern themselves. They cannot be abridged by the exercise of any power of government in the absence of a showing that the action has been taken in furtherance of a legitimate governmental interest. The court rejected any assumption that there exists a government power in any area that can be invoked at the will of officials that cancels out the first Amendment rights of citizens.

Appellants seek reversal here. They do not assert any justification, in the realm of foreign affairs, national security or otherwise, for their actions. Rather their position is that Congress' exclusion of Dr. Mandel is unreviewable regardless of its impact on the First Amendment rights of citizens. This argument is fundamentally erroneous in several respects:

First, Congress has not excluded Dr. Mandel from the temporary admission he seeks. Appellants depict §212(a)(28) as imposing an absolute ban on entry like §§212(a)(27) and 212(a)(29). But, the contrary appears plainly from the face of the statute, its history and its application. Temporary admission of aliens like Dr. Mandel is specifically authorized by Congress. By contrast to §§212(a)(27) and (a)(29), the waiver provision in §212(d)(3)(A) is expressly applicable to §212(a)(28). Indeed, Congress explicitly rejected proposals to accomplish what appellants would by their argument here. Congress refused to enact the bills reported by its committees that treated §§212(a)(27), (a)(28), and (a)(29) alike — absolute and exempted from the waiver provision. Moreover, the legislative history reveals that Congress affirmatively intended that waivers be granted where admission serves the public interest. There is no doubt that Dr. Mandel's admission serves the public interest. The Department of State specifically recommended a waiver because entry would serve "the interest of free expression of opinion and exchange of ideas. . . ." Dr. Mandel was admitted in 1968 specifically for the purpose of attending academic meetings at more than 30 universities. Congress has contemplated precisely what the actual practice is under these provisions. Appellants' reports confirm that

waivers are regularly granted where entry serves the public interest. The vast majority of aliens classified under §212(a) (28) who apply for waivers are in fact admitted.

In sum, the statutory provisions involved here delegate the exclusion power to appellants, to be exercised on a regular, case-by-case basis, not arbitrarily or for wide-scale exclusion. By these provision Congress has established a process for screening aliens in Dr. Mandel's class, to determine whether entry would serve the public interest, and if so, whether there is any basis or countervailing reason for the alien's exclusion.

Second, appellants argument reflects a strategy to avoid responsibility for their actions. If Congress had included every alien classified under §212(a) (28) then the findings by Congress would provide justification for each alien excluded. But Congress has not done so; appellants therefore must have specific justification for excluding an alien, upon whose admission depends the free exercise of First Amendment rights by citizens.

The only theory upon which appellants argument can be based, although not directly stated here, is that the power to grant or deny a waiver can be exercised arbitrarily or for the specific purpose of supressing academic meetings called by Américans and the expression of ideas they have a right to hear. This interpretation of the waiver power is contrary to the intent of Congress and the requirements of the First Amendment. As such appellants' refusal to grant a waiver to Dr. Mandel and to authorize his admission, without valid reason to justify this refusal, exceeds their statutory delegation of power and the proscriptions imposed by the First Amendment.

Third, the cases appellants rely on to support their position that an exercise of the exclusion power is unreviewable, are inapposite. Those cases involved assertion of rights by aliens only; none of the cases involved a challenge based on the First Amednment rights of citizens. Excluded aliens have no First Amednment rights. Moreover, each case involved a request by aliens to enter or remain in the country as residents. Therefore, unlike here, the discrete issue of the First Amend-

ment right to have an alien attend specific academic meetings was not and could not be presented. In other words, in those cases, unlike here, citizens could not even argue that they had specific and crystalized First Amendments interests at stake. The cases applicable here are those in which the Court has consistently ruled that where the exercise of even the greatest of governmental powers — the war power, the power to conduct foreign relations, or the power to safeguard national security — abridges the First Amendment rights of citizens, the courts have power, indeed, the obligation and duty to determine whether the government action is justified as being in furtherance of a legitimate interest and not wholly arbitrary or specifically directed at the suppression of protected liberties.

ARGUMENT

AMERICAN CITIZENS HAVE A RIGHT GUARANTEED BY THE FIRST AMENDMENT TO MEET WITH AN ALIEN FOR FREE AND OPEN ACADEMIC DISCUSSIONS WHICH CANNOT BE PREEMPTED BY THE ALIEN'S EXCLUSION WHERE NO LEGITIMATE PURPOSE IS SERVED THEREBY.

The narrow question in this case can be best understood by deliniating what is not at issue.

Thus, appellants do not contest the standing of the appellees to enforce their rights to engage freely in academic debate and inquiry and to vindicate the public interest in the uncensored flow of information and ideas. For there can be no question that appellees have suffered direct and irreparable injury to their First Amendment rights, in view of the fact that exclusion of Dr. Mandel abruptly curtailed their scheduled meetings, which were called solely for the purpose of academic discussions. Appellees, moreover, are clearly within the zone of protection afforded by the First Amendment, since they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien.

Appellants acknowledge, furthermore, that Dr. Mandel was invited to attend genuine academic meetings at various universities and public forums in this country, and that these meetings were the only purpose for his entry, which for the Stanford Conference would have lasted six days and for the subsequent invitations no more than eight or nine. This, then, is not a case where the alien seeks entry for general purposes of business or pleasure (see 8 U.S.C. §1101(a)(15)(B)) or as a resident immigrant, to live here and have the advantages of our hospitality.

Nor does this case involve a question of the power of Congress to declare the expulsion or exclusion of an alien who is or was a member of the Communist Party or any affiliated or similar organization.

Again, this is not a case where the Executive has declared that an alien's exclusion is required by foreign policy considerations. In fact, a contrary declaration appears expressly in the record. The Department of State, exercising its Congressionally assigned function in the waiver process of reviewing the foreign policy aspects of Dr. Mandel's application, recommended the issuance of a waiver and a nonimmigrant visa.

Furthermore, this is not a case where the alien's temporary entry has been declared by appellants to be in any way "prejudicial to the public interest, or [that it would] endanger the welfare, safety, or security of the United States." Such aliens are excluded under all circumstances by § 212(a)(27) of the Act, which is concededly not applicable to Dr. Mandel. Nor is Dr. Mandel a member of any class of aliens, with respect to which the President has proclaimed, under the authority delegated to him by §212(f) of the Act, that entry of such aliens "would be detrimental to the interests of the United States." Indeed, Dr. Mandel's temporary admission is not peremptorily barred by any directive of the Executive.

Appellants, assert that "[t]he First Amendment's guarantee of freedom of speech does not include the power to require the admission of an alien Congress has refused to admit and it does not confer authority in appellees to determine which

aliens should enter the country." (Gov. Br., p. 39). But this is an effort to side-step the real issue in the case.

Appellees do not question the proposition, as stated by the Court in *Galven v. Press*, 347 U.S. 522, 530, that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign policy and national security." Likewise, when Congress or appellants, in the lawful exercise of delegated authority, decide to exclude an alien to achieve a national security or foreign policy objective, First Amendment rights of citizens cannot override that decision. That is so, however, not because citizens who anticipate the alien's participation in their academic meetings are without First Amendment rights. Rather, it is so because exclusion pursuant to a legitimate government interest satisfies the controlling First Amendment standards. As the Court has held:

"a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377.

This is not a case in which Congress has excluded Dr. Mandel. Had Congress enacted a blanket exclusion of every alien in the class described by §212(a)(28)(D) and (G)(v) this would be an entirely different case, for then the general justification applicable to all aliens in the class might be asserted to satisfy First Amendment requirements. Congress instead expressly decided to designate a class of aliens who are excludable, and has vested a waiver power in the Executive

to be exercised on a case by case basis.¹⁰ It is the unreasonable and unjustified exercise of that power which is the issue here.

Nor is this a case in which appellants, after screening an application, as Congress has directed, determined that there are countervailing reasons warranting exclusion. The First Amendment rights of citizens would not override action taken in furtherance of a valid government interest. See *United States v. O'Brien, supra*.

What remains, therefore, is a narrow question: Where academic meetings sponsored by Americans and the public interest in the free flow and exchange of information depend directly on the admission of an alien, does the First Amendment require appellants to have a legitimate reason for deciding to deny a waiver and to exclude the alien?¹¹

10. Congress expressly rejected proposed versions of the Act that would have made the waiver provision in applicable to subsection (a)(28), as well as to subsections (a)(27) and (a)(29). See e.g., S.Rep. No. 1515, 81st Cong., 2d Sess. 781-801 (1950).
11. The court below decided this question without reaching the issue of whether in substance the waiver refusal was arbitrary. That issue was foreclosed when appellants disavowed reliance on the alleged violation of visa conditions by Dr. Mandel in 1968; and failed to advance any other justification for their action. Appellants therefore do not contend that Dr. Mandel should be barred from attending academic meetings in this country because his presence, or anything he would say, poses a danger to national security or would be prejudicial to the public interest. Nor is there a claim that his admission will adversely affect our foreign relations with Belgium, his native country, or any other nation. Indeed, the Department of State has declared that no foreign policy considerations require exclusion. There is also no claim even that appellants lack sufficient information to make a determination of the security risk involved in Dr. Mandel's entry, that Dr. Mandel is uncooperative in providing information, that adequate visa conditions cannot be implemented, that there is reason to believe Dr. Mandel will not abide by such conditions, or that divulgence of the reason for his exclusion would itself harm the national interest. In short, no reason is offered and for all that appears, none exists, for appellants' decision to refuse to issue a waiver under §212(d)(3)(A).

I

The First Amendment Protects the Right of American Citizens to Receive Information from and to Hold Academic Meetings with an Alien

The court below held:

"The concern of the First Amendment is not with a non-resident aliens' individual and personal interest in entering and being heard, but with the rights of the citizens of this country to have the alien enter and to have him explain and seek to defend his views; that as *Garrison* and *Red Lion* observe, is the essence of self-government." (J. App. 22a-23a).

The freedom of American citizens to receive information and ideas, which this Court has said is "fundamental to our free society,"¹² is "nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487.¹³ Like the press, American universities play an essential role in our system of gathering, evaluating and disseminating information from diverse sources. By acting as "the great interpreters between the government and the people," both institutions ensure the People's right of self-governance. *Grosjean v. American Press Co.*, 297 U.S. 233, 250. "These pages need

12. *Stanley v. Georgia*, 394 U.S. 557, 564; see also *New York Times Co. v. United States*, 403 U.S. 713, *Red Lion Broadcasting Co. v. FCC*, *supra*; *Griswold v. Connecticut*, 381 U.S. 479, 482; *Lamont v. Postmaster General*, 381 U.S. 301, and at 307-308 (Justice Brennan, joined by Justices Goldberg and Harlan concurring); *Martin v. City of Struthers*, 319 U.S. 141, 142-143; *Marsh v. Alabama*, 326 U.S. 501, 508-509.

13. See also *Epperson v. Arkansas*, 393 U.S. 97.

In numerous recent decisions, the right to hear has been successfully asserted by representatives of university audiences to void regulations imposed by university administrators which, by their design or sweeping effect, barred entry to classrooms and lecture halls by invited, outside speakers, whose views did meet with official approval. See *Molpus v. Fortune*, 432 F.2d 916 (5th Cir. 1970); *Pickings v. Bruce*, 430 F.2d 595, 598-599 (6th Cir. 1970); *Brooks v. Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969); *ACLU v. Radford*, 315 F.Supp. 893 (E.D. Va. 1970); *Smith v. University of Tennessee*, 300 F.Supp. 777 (E.D. Tenn. 1961); *Snyder v. Board of Trustees*, 286 F.Supp. 927 (D. Ill. 1968).

not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities," *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Justice Frankfurter concurring). "The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603; see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250.

Appellants recognize the impact of their decision on the academic freedom of American citizens and on the right of the public generally to the free flow of information. They must also be aware that their action evinces a lack of concern for these First Amendment rights, particularly by the delays that attended notice of their decisions, the suggestion here that trans-Atlantic telephone hook-ups or prepared texts are substitutes for classroom or conference discussions, and the fact that the decision to refuse a waiver was apparently not made by the Attorney General, but rather by an employee of the Immigration and Naturalization Service.

Yet, although academic meetings in fact were and continue to be prevented by Dr. Mandel's exclusion, appellants nevertheless maintain that American citizens have not been deprived of any First Amendment rights. They argue not that there was sufficient government interest to warrant Dr. Mandel's exclusion, but rather first, that "section 212(28) (D) and (G) (v) in no way restrains or inhibits them [appellees] from speaking or publishing," and second, "action not speech is being regulated." (Gov. Br., p. 30). Neither argument has merit.

The first argument by way of attempted mitigation is a concession that Dr. Mandel's exclusion has caused substantial injury to the First Amendment rights of citizens. Appellants point out that appellees are not prevented from reading Dr. Mandel's books and articles, listening to tape recorded speeches, talking to him over a trans-Atlantic telephone hook-up or

visiting him abroad. But we cannot assume that appellants are contending that "technological developments" and the mere reading of or listening to prepared texts is a substitute for classroom discussions. For what appellees have lost by Dr. Mandel's exclusion is the very essence of academic freedom. As a learning process and as a means for receiving, exchanging and evaluating ideas, there is nothing comparable in academic study to the face to face discussion that takes place in a classroom.¹⁴ The classroom, like the courtroom, provides a setting where views may be tested by sharp and penetrating inquiry, where the answers to questions may be judged both on their precise substance and the responsiveness and sincerity with which they are given, and where new ideas and approaches are often generated by the excitement of discussion. Why else do private and public systems of education in this country devote such enormous resources to the classroom? And we note a similar commitment of resources by the judiciary in this country to face-to-face debate. Just as this Court has found written submissions generally to be no substitute for oral argument, *Goldberg v. Kelly*, 397 U.S. 254, 289, so, too, the availability of Dr. Mandel's books or tape recordings in this country cannot replace his presence in a classroom or conference.

14. This Court has recognized that personal contacts with foreign scholars is invaluable to the growth and progress of American scholarship. See *Kent v. Dulles*, 357 U.S. 116, 126-127; *Sweezy v. New Hampshire*, *supra* at 250. To grant appellants' unlimited authority to permit or refuse admission capriciously or for the actual purpose of suppressing debate, would give the government a strangle hold on important sources of information in every area of academic inquiry. See *Hearings Before the President's Commission on Immigration and Naturalization*, 82d Cong., 2d Sess. 408, 1464 (1953).

The crucial and irreplaceable role filled by classroom and conference discussion in the communication and thorough analysis of ideas in academic study has been frequently documented. See Biehler, *A Handbook of Psychology Applied to the Art of Teaching*, 207 (1966); Seagoe, *The Learning Process*, 60-61, 80-84, 142-143 (1970); Erickson & Kind, *A Comparison of Visual and Oral Presentation*, 6 *School & Society*, 146, 147-148 (1917); Bugelski, *The Psychology of Learning Applied to Teaching*, 127, 130, 265-266 (2 ed. 1971); Lindgren, *Educational Psychology in the Classroom*, 153, 318-319 (1967).

See also Heisenberg, *Physics and Beyond, Encounters and Conversations* (1971) (*passim*), relating the significant breakthroughs achieved in a series of scientific conferences held in the 1920's that led to the discoveries upon which modern physics is founded.

Obviously, trans-Atlantic hook-ups and tape-recorded addresses do not provide the crucial opportunity for face-to-face discussions. The suggestion that those interested in meeting with Dr. Mandel can do so abroad is so plainly impractical as to merit no further discussion.

Equally, without support is appellants' second argument, that by exercising their control over the "action" upon which academic meetings depend, they can prevent those meetings at will without implicating the First Amendment rights of citizens. It is significant in this regard that appellants have left to implication, but have not directly stated that such control can be employed for the very purpose of aborting academic meetings and silencing the expression of views Americans have a right to hear. But, the decisions of this Court leave no doubt that the right to receive information is not to be defeated on a claim by the government that it is merely controlling the "action" by which the information is received.

Here, as the court below said, "the admission of Mandel is but a lever by which the constitutional rights of his prospective audience can be given effect . . ." (J. App. 25a) But the power to control that lever cannot be equated with the power to censor. It is firmly established that "the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct." *Food Employees v. Logan Plaza*, 391 U.S. 308, 323.

Just as the free flow of information to the public cannot be impeded by unreasonable restrictions on the "action" involved in the circulation and distribution of newspapers and leaflets, *Lovell v. Griffin*, 303 U.S. 444, 452, so, too, the flow of information from an equally important source, the nation's universities, cannot be impeded by unreasonable restrictions on the "action" involved in attending academic meetings. See *Sweezy v. New Hampshire*, *supra*; and the cases cited *supra*, p. 18, n. 13, involving restrictions on the right of campus audiences to hear outside speakers. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren

market place of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 307, 308 (Justice Brennan concurring).

Lamont involved the undisputed power of the government to control the entry of mail from foreign sources. The government's regulation was concerned solely with the entry and delivery of the mail. Action, not speech, was being regulated, although, as here, the right to receive information was directly affected. Clearly, in *Lamont* the alien sender possessed no constitutional right whatsoever to have his mailings of "communist political propaganda" enter this country or be delivered. On these facts, the Court ruled that regulation of such mail which places an unjustifiable burden on the American addressee's right to receive information violates the First Amendment. See also *United States v. Hiatt*, 415 F.2d 664, *cert. denied* 397 U.S. 936.

Inexplicably, appellants contend that *Lamont* did not involve the right to receive information at all, but only the petitioner's own right to use the mails in sending for the detained literature. (App. B., p. 33) The Court's clear holding refutes this argument:

"The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the Lovell, Thomas, and Murdock cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of the mail. 381 U.S. at 306.

The burden imposed on the right to receive information by appellants' application of the statutes involved here is far greater than in *Lamont*. In *Lamont*, the statute applied generally to all addressees and permitted no discrimination among them. It further required the Postmaster General to forward the detained mail immediately upon request by the addressee. By contrast, appellants claim an absolute and unreviewable

power to select at their will the academic meetings they will or will not permit, and to not merely delay, but to bar permanently the alien's attendance at these meetings. Moreover, there is no danger here of Americans being subjected to a torrent of unsolicited information, as there was in *Lamont*, where Congress may have been seeking to protect the American addressees from receiving unwanted mail. Cf. *Rowan v. Post Office Dept.* 397 U.S. 728. Dr. Mandel has been specifically invited to speak by members of the American academic community and his audience will be composed exclusively of those who choose to hear him.

Red Lion Broadcasting Co. v. FCC, *supra* is in the same vein as *Lamont*. Clearly, as *Red Lion* holds, "[n]o one has a First Amendment right to a license or to monopolize a radio frequency . . ." (395 U.S. at 389), but equally clear is the Court's declaration that neither Congress nor the FCC can regulate a licensee's use of his frequency in such a way as to abridge the right of listeners to receive information. *Id.* at 390.¹⁵

"Action" is undoubtedly the subject of the controls imposed by Congress under the Trading with the Enemy Act, 50 U.S.C. App. §5(b). Regulations adopted pursuant to that Act require the detention of publications mailed from such countries as China and North Vietnam, until the American addressees deposit payments for those publications into blocked accounts. But, as the Court of Appeals for the Second Circuit held in *Teague v. Regional Commissioner*, 404 F.2d 441 (1968) *cert. denied*, 394 U.S. 977, the Act and the regulations must satisfy First Amendment standards. The court rejected a

15. Likewise, while the state may protect the privacy of those residing on private property, it may not regulate entry unreasonably or for the purpose of impeding the flow of information to those residents. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420; *Martin v. Struthers*, 319 U.S. 141, 143-144; *Tucker v. Texas*, 326 U.S. 501. Again, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 and *Blount v. Rizzi*, 400 U.S. 410, the Court declared that no one has a right to engage in the commercial mailing or importation of obscene literature, but held that the First Amendment rights of potential purchasers requires administrative and judicial review procedures that accord with the standards established in *Freedman v. Maryland*, 380 U.S. 51.

claim of constitutional violation after rigorous scrutiny of the purposes and application of the Act and regulations. It ruled on the basis of a showing by the government, such as it fails and refuses to make in this case, that, in practice, the detention period was very short, that the Customs regulations were not applied for the purpose of restricting "the flow of information or ideas" and that any such restriction, as distinguished from *Lamont*, was merely incidental to the achievement by narrowly limited means of a "proper, important and substantial" government objective. Furthermore, as the court found, the Customs regulations were particularly solicitous of First Amendment interests in providing for the unrestricted receipt of foreign publications by universities and libraries, "institutions that can give the publications the broadest exposure to the public and that can make the greatest use of them for purposes of study..." 404 F.2d at 446 n. 6.

The decisions involving the exclusion of outside speakers from university classrooms and lecture halls are indistinguishable from this case. See *supra*, p. 18, n. 13. Contrary to appellants' assertion (Gov. Br. p. 32, n. 41) members of the general public do not have a First Amendment right to enter onto and use university facilities to express their views. Those cases, like the present one, were concerned exclusively with the right of members of the university community to hear an outside speaker. That right is sustained where no countervailing reason of safety, health or security warrants the speaker's exclusion.

Contrary to appellants' contention the decision below does not conflict with the Court's ruling in *Zemel v. Rusk*, 381 U.S. 1. There is no dispute with the proposition stated in *Zemel* that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. at 17. But while the "right to gather information" may be restrained for valid and compelling reasons, as may any other exercise of First Amendment rights, it does not follow that the right may be restrained without justification or for the purpose of preventing Americans from receiving the information they seek

and are entitled to have. This was made clear in *Zemel*, where it was expressly found that the ban on issuance of passports for travel to Cuba was based on "foreign policy considerations affecting all citizens," which were characterized by the Court as the "weightiest considerations of national security." 381 U.S. at 13, 16.

The Court's analogy in *Zemel* to the power to prevent unauthorized entry into the White House is revealing. 381 U.S. at 17. In *Zemel*, unlike the present case, the justification for the government action and therefore the absence of an enforceable First Amendment right, was self-evident from the foreign policy considerations involved, including the existence of extreme hostility between this nation and Cuba, the fact that restrictions on passport validations were instituted in the direct aftermath of the Cuban missile confrontation and the severance of diplomatic relations with Cuba, and the determination by our Government and other members of the Organization of American States that travel restrictions were necessary to combat subversion of Western Hemisphere countries. Restrictions in furtherance of legitimate government interests do not violate the First Amendment. *United States v. O'Brien*, *supra*.

It is therefore, absurd to argue, as appellants have, that if the First Amendment requires Dr. Mandel's admission, then any citizen can compel the admission of beggars, the diseased, criminals or any other class of aliens. No one suggests that the First Amendment overrides the clear justification for excluding disease carrying aliens, for example. As the Court held in *Martin v. Struthers*, *supra* at 143:

"This freedom [of speech and press] embraces the right to distribute literature, *Lovell v. Griffin*, 303 U.S. 444, 452 and necessarily protects the right to receive it. . . . Yet, the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. *Cantwell v. Connecticut*, 310 U.S. 296, 304. No one

supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes . . .”

The point of this case is that *there is no justification for Dr. Mandel's exclusion*. Unlike *Zemel*, and such cases as *Galven v. Press*, *supra*, there is no blanket prohibition involved. Thus, there exists no general justification applicable to every alien in Dr. Mandel's class warranting automatic exclusion. Nor is this a case where the justification is self-evident, as where an alien possesses such characteristics as a communicable disease or criminal tendencies, or where his mere presence would be disruptive, as in the case of an unauthorized visitor to the White House.

Also, by contrast to *Zemel*, the rights involved here are those of academic freedom and the public interest in the free flow of information. *Zemel* claimed a “right to gather information” so that he could “satisfy [his] curiosity . . . and [become] a better informed citizen.” 381 U.S. at 4, 17. For this reason, too, *Zemel* and this case are strikingly different from each other. First, the petitioner in *Zemel* asserted an exceedingly personal interest that was only very remotely, if at all related to the public interest that is directly at stake in this case. Second, the Court has consistently held that the First rights asserted here — the right to speak, listen, and debate — are “fundamental,” indeed basic to the ability of the people to govern themselves. The “right to gather information” has not received similar recognition. For example, in *New York Times Co. v. United States*, 403 U.S. 713 it was not even argued that the right to gather information would support the illegal acquisition and possession of classified government documents. Rather, the position of the newspapers rested solely on the right of the public in the free flow of information, which forbids an injunction against publication of such documents, in the absence of a clear showing of imminent danger to the national interest.

II

The Statutory Scheme Involved Here Creates A Screening Process For Aliens Classified Under §212 (a) (28) (D) And (G) (v) Which Provides For Entry In The Public Interest Under The Waiver Provision, §212(d) (3) (A) And Therefore, On Its Face, Is Consistent With The Requirements Of The First Amendment.

Appellants next argue that Congress, not they, excluded Dr. Mandel. The only question, according to appellants, is "whether Congress' exclusion of aliens such as Dr. Mandel violates the First Amendment." (Gov. Br. p. 4) Appellants failure to mention their denial of Dr. Mandel's waiver application is particularly striking in view of the administrative practice disclosed in their brief. Based on this information, it is clear that the waiver provision is an integral part of the statutory mechanism Congress created to effectuate its purposes. In fact, the vast majority of aliens classified under §212(a) (28), who apply for waivers, are admitted. In 1969, for example, out of a total of 4,993 waiver applications only 9, including Dr. Mandel's, were rejected. The following year only 4 out of 6,193 waiver applications were denied.¹⁶

Appellants attempt to support their argument with a quotation from the opinion below that is strikingly distorted by a selective deletion. (Gov. Br. p. 35) The Court did not decide that §212(a) (28) (D) and (G) (v) and §212(d) (3) (A) were unconstitutional on their face. Its holding is clear when the missing words are added: "The challenged parts of the Act as here applied do only the latter forbidden thing [prevent speech for

16. Appellants' statistics do not, however, make clear how many aliens in Dr. Mandel's specific class, §212(a) (28) (D), were refused a waiver. Nor do they show how many aliens were denied a waiver after a recommendation by the Department of State. Given the primary concern of Congress with Communist party affiliates, Gordon and Rosenfield, *supra* at §2.47(c), p. 2-225, and the firmness of the State Department's recommendation in this case, it is safe to assume that exclusion of an alien in Dr. Mandel's position is a very rare, if not a unique phenomenon.

no lawful purpose] and do not reflect the genuine exercise of the implied power of alien exclusion." (Emphasis added)

The purpose behind appellants' strategy is apparent. If Congress had excluded from temporary admission, all aliens in Dr. Mandel's class, there would be no need of a specific justification for the exclusion of each member of the class. Treating the waiver provision as nonexistent, as appellants do, it can then be argued as appellants have, that the justification for Dr. Mandel's exclusion as well as the exclusion of all other members of his class is provided by subsections (D) and (G) (v) of §212(a) (28), which are themselves "an expression of the foreign policy of the United States and are also based on considerations of national security." (Gov. Br. pp. 35-36). In thus casting the case as a direct clash between §212(a) (28) (D) and (G) (v) and the First Amendment, appellants seek to shield their own action from review.

Appellants approach would have the Court treat subsection (a) (28) as if it were written and intended to be applied like subsections (a) (27) and (a) (29) of §212. The latter are blanket exclusion provisions as to which the waiver provision is specifically made inapplicable. Aliens covered by these provisions are excluded automatically and absolutely. The justification for the exclusion of all such aliens appears in the Congressional findings.

This case is quite different from the one appellants would like it to be. Congress, by providing a waiver of ineligibility, contemplated the normal administrative practice — that each application for admission from aliens classified under subsection (a) (28) would be treated on its individual merits. Rather than providing a general justification for exclusion of all aliens in the class, the provisions involved constitute a delegation of exclusion power to appellants. They are charged with the responsibility of screening each application for a waiver and of determining as to each whether admission serves the public interest, and if so, whether countervailing reasons nevertheless justify exclusion.

Appellants ignore the waiver provision and their action

under it for another reason. By their silence they avoid stating directly, what they have stated below, that they interpret the waiver authority as a completely unlimited power, unrestrained by any Congressional or Constitutional mandates. Under this interpretation, citizens would have no constitutional basis to complain in court, even if Dr. Mandel were denied a waiver as a means of punishing some of those Americans who invited him for their outspoken opposition to the government's policy in Vietnam. Nor would there be a basis for complaint if the waiver was denied for the purpose of preempting academic discussions. Following the logic of their position, appellants would claim an unreviewable power to express anti-Catholic sentiments, for example, by excluding under the provisions involved here, alien Catholic clerics invited to participate in American services.

To state these possible applications of appellants' position, which upon the record in this case do not seem implausible, is to demonstrate that their interpretation of the waiver power is contrary to what Congress intended and what the First Amendment requires.

Never has this Court sustained such a grant of unfettered power to censor what Americans may say or hear. As Justice Whittaker said in *Staub v. City of Baxley*, 355 U.S. 313, 322:

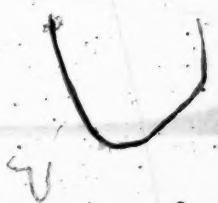
"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151.

Nor can it be concluded that Congress intended to delegate such a power, which would in effect be a negation of its own

power to declare immigration policy. Moreover, even if there were no well settled preference for construing Congressional enactments in harmony with First Amendment principles, such a construction would be compelled by the clear wording, history and administrative application of the provisions involved. But it also should be noted that the Court has given repeated and strong emphasis to the "cardinal principle" that it will "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62; see also *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369. As a corollary to that principle the Court has stated emphatically that in construing legislation, it will not assume Congress was indifferent or hostile toward First Amendment liberties. See *Schneider v. Smith*, 390 U.S. 17, 26-27; *Greene v. McElroy*, 360 U.S. 474, 507; *United States v. Romley*, 345 U.S. 41, 46-47.

Appellants interpretation is refuted by the very structure and wording of §212. Obviously, where an alien would on entering engage in activities "prejudicial to the public interest" or worse, Congress quite naturally has forbidden such entry peremptorily. See §§212(a)(27) and (a)(29). No waiver provision is applicable. But where Congress found that certain political affiliations or beliefs raise doubts about the aliens' admission, but are not conclusive evidence that entry in every case, even temporarily, would be harmful, it provided for a waiver of ineligibility. Clearly, Congress does not have to take the risk of allowing such aliens to live here permanently. Nor could American citizens claim a First Amendment right to have an alien admitted as a resident, not only because of the long-term dangers Congress has power to avoid, but also because resident status involves far more than the limited activity of participating in specific academic discussions. But, consistent with First Amendment interests Congress provided for temporary admission of aliens like Dr. Mandel. Of course, because Congress has a basis for concerning itself with the entry of aliens who have beliefs that are Marxist or Communist in nature, it created an exceedingly comprehensive screen-



ing process. In effect by requiring all aliens in subsection (a) (28) to apply for waivers, Congress saw to it that a thorough evaluation of the alien's background and purposes for entry would be made by the Departments of State and Justice in their respective areas of foreign affairs and internal security. The system thus established, screens out those about whom there is any basis for finding that entry would be detrimental to national interests and permits temporary entry of desirable aliens under strictly controlled circumstances.

Clearly, to vest appellants with a wholly unlimited power, one that can be exercised arbitrarily, would defeat the very foreign policy objectives which Congress intended the waiver provision to achieve. It would hardly be conducive to the negotiation of reciprocal privileges for Americans with other nations if appellants were not bound by the terms of their authority to carry out their side of the arrangement.

Appellants' practice under the waiver power is the most authoritative interpretation of it, particularly where, as here, Congress has been given specific notice of such practice and has refused to alter it.¹⁷ See *Red Lion Broadcasting Co. v. FCC*, *supra* at 381. In granting the overwhelming majority of waiver applications made by aliens classified under §212(a) (28), appellants confirm that the provision was intended to be a mechanism for the controlled entry of aliens like Dr. Mandel, not for arbitrary or wide-scale denials. It is assumed that appellants carefully screened each application to prevent entry that would be harmful to national interests.

There is no legislative history that supports appellants' interpretation. Rather, the history on this point indicates clearly that Congress contemplated the granting of waivers on a regular basis for the "temporary admittance of otherwise inadmissible aliens both for humane reasons or for reasons of public interest." See S. Rept. No. 1137, *Committee on the Judiciary*, 82d Cong., 2d Sess., p. 12 (1952); Gordon and Rosenfield, *Immigration Law and Procedure*, §2.53(b), pp.

17. The Attorney General is instructed to make a detailed report to Congress in any case where a waiver is granted. See §212(d)(6).

2-245-246. There can be no doubt that by providing for admission in the "public interest" Congress sought, among other purposes, to serve the important First Amendment interests asserted here, including the fundamental right of the people to the uncensored flow of information and the maintenance of open and free academic debate. Cf. *Red Lion Broadcasting Co. v. FCC*, *supra* at 390.

Again, the actual application of the provisions involved supplies confirmation. Thus in 1969, the Immigration and Naturalization Service reported that with respect to all categories of inadmissible aliens described by §212(a), "6,236 waivers [4984 to aliens classified under §212(a) (28)] were granted to nonimmigrants whose admission was found to be in the public interest." 1969 Annual Report, p. 8. In this case, after determining that Dr. Mandel had not knowingly violated his visa conditions in 1968, the Department of State recommended the granting of a waiver "in the interest of free expression of opinion and exchange of ideas . . ." (App. 48). In 1968, Dr. Mandel was admitted solely for the purpose of participating in academic meetings at more than 30 universities in the United States. (App. 68) Moreover, it is significant that the Department of Justice has adopted regulations which provide for the automatic admission, upon a recommendation by the Secretary of State, of groups of aliens otherwise inadmissible under §212(a) (28) along with their families for the specific purposes of attending international conferences held in this country. See 8 C.F.R. §212.4(d).

In accordance with the screening process Congress created, appellants at various stages expressed the view that while Dr. Mandel's admission would serve the public interest, his activities in 1968 warranted denial of his 1969 waiver applications. These alleged violations of visa conditions were abandoned, obviously because appellants recognize them to be baseless. But, their assertion, alone, indicates quite clearly that appellants recognize the requirement to have reasons for denying a waiver to an alien whose admission serves the "public interest."

In sum the screening process Congress has established provides for treatment of aliens like Dr. Mandel in a manner that is fully consistent with the requirements of the First Amendment. Where, as here, appellants act to exclude an alien whose admission serves the "public interest" in the uncensored flow of information and the freedom of academic debate and inquiry, without any reason or for an illegitimate reason, they not only exceed their vested authority and abuse their discretionary power, but they unjustifiably deprive citizens of basic First Amendment rights.

III

An Exercise Of The Exclusion Power That Unjustifiably Disrupts And Prevents Academic Meetings In This Country Is Subject To Review Under First Amendment Standards At The Instance Of Affected American Citizens.

Appellants final argument is that regardless of whether their action violates First Amendment rights of citizens, it is not subject to review by the judiciary.

A series of exclusion and expulsion cases is cited for support, but those cases involve claims of right by aliens only and are inapposite. Aliens who have not been admitted have no First Amendment rights.¹⁸ This is true of Dr. Mandel. But

18. This was the holding in *Turner v. Williams*, 194 U.S. 279. The Court concluded that an alien who enters the country illegally has no basis on which to claim that deportation deprives him of his freedom of speech.

It should be noted, however, that resident aliens are afforded substantial constitutional protections, including the safeguards of the Due Process Clause of the Fifth Amendment and the guarantees of the First Amendment. See *Harisiades v. Shaughnessy*, 342 U.S. 580, (applying the test established by *Dennis v. United States*, 341 U.S. 494) see also *Bridges v. Wixon*, 326 U.S. 135, 148; *Galven v. Press*, *supra*. Indeed, the earliest cases recognize that however great the powers of exclusion and expulsion, they nevertheless may not be exercised in conflict with other provisions of the Constitution. See *The Chinese Exclusion Case*, 130 U.S. 591, 604; *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 713.

In any event, if the broader language of *Turner* and *Galven* suggests a narrow reading of the First Amendment, it should be discounted by the fact that the government interest asserted was never tested against the rights of anyone but aliens.

this case exclusively concerns the rights of American citizens. Here an alien's exclusion has seriously impaired the First Amendment right of citizens to hold academic discussions and to receive information. Planned meetings were disrupted and specific invitations or contemplated discussions were precluded. In this case the First Amendment interests of affected Americans have crystalized to the point where these citizens have legal standing to challenge appellants' action that has deprived them of basic rights.

Appellants contend that the court below erred because Congress has the exclusive power to formulate "[p]olicies pertaining to entry of aliens and their right to remain here . . ." *Galven v. Press*, *supra* at 531. But this misses the point of the court's decision entirely. Of course the courts lack power to make or review the wisdom of immigration policies. The sole duty of the federal judiciary in a case like this one, as the court below ruled, is to determine whether a specific policy is within the power of Congress to enact and is otherwise in harmony with basic liberties guaranteed to the People. See *United States v. O'Brien*, *supra*.

In a consistent line of decisions over a period of many decades, this Court has rejected claims by government officials, like those made by appellants, that their operations are exempt from judicially enforceable First Amendment limitations. Although these cases have frequently involved the assertion of governmental powers of the broadest dimensions — the war power, the power to maintain national security, the power to conduct foreign affairs, the power to regulate immigration — no suggestion lingers in any one of them to support the existence of a governmental power that is supra-constitutional in nature, whose mere assertion is justification for its exercise. Appellants effectively recognize the necessity of justifying Dr. Mandel's exclusion, although the justifications they offer are not relevant or responsive to the issues in this case. See Gov. Br. pp. 36-37.

As stated in *United States v. Robel*, *supra* at 264: "When Congress' exercise of one of its enumerated powers clashes

with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine 'whether the resulting restriction on freedom can be tolerated.' The dissent by Justice White expresses agreement with this principle. Although reaching a different result with respect to the statute involved, the dissent rejects the argument made here that an exercise of the war power is a matter of unreviewable policy.

Robel concerned a statute that made it a criminal offense for any employee of a "defense facility" to remain a member of the Communist Party, regardless of the quality or degree of membership involved. The Court overruled a claim that a statute of such breadth was justifiable as an exercise of Congress' war power. The Court held: "The phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit. [E]ven the war power does not remove constitutional limitations." 389 U.S. at 263-264. See also *Schneider v. Smith*, *supra*; *United States v. O'Brien*, *supra*.

Likewise, *Zemel v. Rusk*, *supra* at 17, unqualifiedly rejected any assumption "that simply because a statute deals with foreign relations, it can grant the executive totally unrestricted freedom of choice."

Similarly, in *New York Times Co. v. United States*, *supra*, the government asserted its "sovereign prerogative" over foreign affairs and national security as the basis for seeking an injunction against publication by several newspapers of certain "Top Secret" classified documents. There, as here, the First Amendment right of the people to receive information was at stake. This right was represented in Court by the newspapers, which claimed no right of their own to obtain, receive or possess the allegedly stolen documents. Significantly, and by contrast with this case, the government did not rest on a bare assertion of "sovereign prerogative" or even the strong inference of compelling interest that inheres in a "Top Secret" classification. Quite the contrary, the government made an extensive evidentiary showing that release of the particular

documents would so directly, immediately and irreparably damage national interests that prior restraint was warranted.

The position taken by the government in this case, that the decision to exclude is not subject to judicial inquiry, was implicitly rejected by every member of this Court in the *New York Times* case. As Justice Harlan said in his dissenting opinion, joined by the Chief Justice and Justice Blackmun: "Constitutional considerations forbid a complete abandonment of judicial control". Cf. *United States v. Reynolds*, 345 U.S. 1, 8 (1953). 403 U.S. at 757. Moreover, even if Congress had enacted a law authorizing the Government to restrain publication of information that would endanger national security or the effectuation of foreign policy, as Mr. Justice Stewart, joined by Mr. Justice White said, "the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved." 403 U.S. at 730.

In *Kent v. Dulles*, 357 U.S. 116 and *Aptheker v. Secretary of State*, 378 U.S. 500, the government unsuccessfully sought to defend the denial of passports to members of the Communist Party on the basis of the same powers asserted here. But in both *Kent* and *Aptheker*, in contrast to this case, the government did not claim that the exercise of these powers was unreviewable. Although this was the position of the government prior to these cases, in *Kent* the government specifically conceded its error in contending that policy pertaining to the issuance or denial of passports is "a purely political matter." This contention, the government acknowledged, had been correctly rejected in *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955). See Brief for Government in *Kent v. Dulles*, p. 26.

Moreover, in *Robel*, *Zemel*, *Kent*, *Aptheker* and other similar cases, the government at least attempted to show that its action was reasonably related to the achievement of a legitimate governmental interest. See also *Teague v. Regional Commissioner*, *supra*. By contrast, in this case, as in *Lamont v. Postmaster General*, no government interest is asserted or is evident, other than to prevent or impede the communication

of political doctrine that does not meet with government approval.

Appellees' right to academic freedom and the public interest in the free flow of information are of equal stature with the First and Fifth Amendment rights asserted in cases like *New York Times Co.*, *Robel*, *Kent*, *Aptheker*, *Lamont* and *Zemel*. If the exercise of foreign relations and national security powers is subject to review in those cases, then the exercise of the exclusion power is subject to review at the instance of American citizens in this case.

CONCLUSION

The court below correctly enforced the First Amendment rights of American citizens to meet and hold academic discussions with Dr. Mandel, an alien scholar. The exclusion of Dr. Mandel serves no legitimate purpose. Neither Congress nor the Constitution has authorized appellants to take such unjustified action, where the direct and immediate result is the disruption or preemption of academic meetings and discussions at American universities. For these reasons the judgment of the district court should be affirmed.

Respectfully submitted.

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April 4, 1972

FILED

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No. 71-15

RECEIVED DEPT. OF JUSTICE

In the Supreme Court of the United States
OCTOBER TERM, 1971

RICHARD D. KLEINDIENST, ACTING ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANTS

v.

ERNEST MANDEL, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

REPLY BRIEF FOR THE APPELLANTS

**ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-16

RICHARD D. KLEINDIENST, ACTING ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANTS

v.

ERNEST MANDEL, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

REPLY BRIEF FOR THE APPELLANTS

1. There is no dispute that Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v), renders Mandel and all other aliens who advocate the doctrines of world communism ineligible for entry into the United States. Until appellees filed their brief in this Court, however, there had been a dispute about whether that statute was constitutional. The district court, agreeing with appellees' argu-

ments to it, held that Section 212(a)(28)(D) and (G)(v) violated the First Amendment because, in view of appellees' freedom of speech, the "Government is without any power to act in the area defined by (a)(28) * * *" (J. App. 26a). In our main brief, we argued that the district court erred in so holding. But now appellees have virtually conceded the constitutionality of that Section.

They now say that if Congress had enacted a "blanket exclusion" of all aliens in the class described by Section 212(a)(28)(D) and (G)(v), this would be valid under the First Amendment. (Brief for Appellees, p. 16.)¹ But Section 212(a)(28) is a "blanket exclusion" in any meaningful sense of the phrase:² the statute states that *all* aliens who advocate world communism "shall be ineligible to receive visas and shall be excluded from admission into the United States."³ Appellees also say that when Congress bars the entry of all aliens within a particular class there is "no need of a specific justification for the exclusion of each member of the class" (Brief for Appellees, p. 28). It follows

¹ See also *id.* at pp. 13, 26, 28.

² Indeed, appellees themselves stated in their Memorandum before the district court in support of their motion for a preliminary injunction, that the statute "establishes an absolute ban against admission into the United States of 'Communist' and other aliens having proscribed beliefs or affiliations" (Memorandum, at p. 24).

³ There are exceptions for diplomatic officers and representatives of foreign governments, as we pointed out in our main Brief, p. 18.

that neither Mandel nor appellees can complain that Section 212(a)(28) renders Mandel ineligible for admission and we so argued in our main brief before this Court.

Appellees shift the focus of their attack on the statute to the fact that the Attorney General has discretion under Section 212(d)(3) to waive an alien's inadmissibility. Apparently the argument is that although Congress can constitutionally bar all aliens of a certain class and although a general justification is sufficient when a particular alien within the class is thereby rendered ineligible for admission, the failure of the Attorney General to approve the Secretary of State's recommendation to admit the alien temporarily despite his inadmissibility may deprive people in this country of freedom of speech.

But if, as we have argued, people here have no First Amendment right to compel the admission of an alien Congress has barred from entry, people here similarly have no First Amendment right to compel

* Appellees are mistaken in asserting that the figures cited at page 18 n. 24 of our brief show that "the vast majority of aliens classified under § 212(a)(28), who apply for waivers, are admitted" (Brief for Appellees, at p. 27). They repeat this assertion several other times in their brief (*id.* at pp. 13, 31, 32).

Under Section 212(d)(3) the Attorney General cannot waive exclusion except upon approval of a recommendation of the Secretary of State or the consular officer. The figures cited in our brief represent the number of such recommendations approved and not approved. The Immigration and Naturalization Service and the Department of State have not compiled figures regarding the number of times such a recommendation is refused by the Secretary or the consular officers.

the Attorney General to allow the admission of such an alien. The fact that Congress permitted exclusion to be waived in the discretion of the Attorney General and required a detailed report whenever this is done⁵ may benefit aliens seeking entry but it certainly gives appellees no greater constitutional rights. Congress itself can, and does, pass private bills to allow the admission of aliens who would otherwise be barred from entry,⁶ but surely this does not mean that the First Amendment rights of people in this country may be violated when a private bill fails to pass. With respect to the First Amendment, the matter is no different when Congress delegates authority to the Executive by enacting a general waiver provision such as Section 212(d)(3), which applies to twenty-nine different categories of aliens who are ineligible for entry.

The precise holding of the court below in this case must be borne in mind. The district court found Section 212(a)(28)—the general exclusion provision—unconstitutional because it violated appellees' freedom of speech under the First Amendment (J. App. 10a-26a). The court then held that since Congress could not constitutionally exclude aliens under Section 212(a)(28), the waiver provision of Section 212(d)(3) must also fall with respect to aliens within Section 212(a)(28) because such aliens *must* be admitted, at least on a temporary basis, and

⁵ 8 U.S.C. 1182(d)(3) and (6).

⁶ See our main brief, at p. 39 n. 55.

the Attorney General therefore has no discretion to exercise. See J. App. 26a-28a.

Rather than supporting the reasoning of the district court, appellees now assert that Congress in Section 212(d)(3) intended to require the Attorney General to waive exclusion in this case because it would be in the "public interest" (Brief for Appellees, pp. 27-33).⁷ This statutory claim was neither raised in the court below⁸ nor considered by it⁹ and we do not believe it is properly before this Court. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, and cases there cited. If the Court concludes that the statutory claim now raised for the first time by appellees is open, this issue should be dealt with in the first instance by the district court. Since the district court decided this case on appellees' motion for a preliminary injunction and

Presumably appellees also think that the Attorney General's refusal to waive Mandel's exclusion was not in the "public interest." But see p. 8 and note 14 *infra*.

⁸ Indeed the district court viewed Section 212(d)(3) as giving unlimited discretion to the Attorney General to decide whether to waive an alien's inadmissibility, although the court said this was "irrelevant" since Congress itself could not exclude aliens within the class described in Section 212(a)(28). (J. App. 25a-26a.)

⁹ If appellees had raised this statutory claim below, the district court would presumably have dealt with it before reaching the question whether Section 212(a)(28) is constitutional.

⁹ Nor did appellees raise this claim in their Motion to Affirm in this Court. See also Rule 15(1)(c) of the Rules of this Court.

did not pass on the other claims that were raised below,¹⁰ including Mandel's contention that the Attorney General abused his discretion, these claims, if still available, also, should be decided first by the district court.

In any event, appellees' statutory claim does not, we submit, support the district court's judgment compelling the government to admit Mandel.¹¹ Section 212(d)(3), which is derived from the Act of 1917,¹² confers upon the Attorney General discretionary authority to lift the ban Congress has imposed with respect to aliens such as Mandel seeking temporary entry. Congress included this provision in the Immigration and Naturalization Act of 1952 because it recognized that with respect to the numerous categories of excludable aliens under Section 212(a) there may be cases "where there are extenuating circumstances which justify the temporary admission of otherwise inadmissible aliens, both for humane reasons and for reasons of public interest." H. Rep. No. 1365, 82d Cong., 2d Sess., at p. 51 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess., at p. 12 (1952).

Congress, of course, could have retained sole authority to lift restrictions by the passage of private bills. Instead, it chose to confer this authority on

¹⁰ See our main Brief, at p. 9 n. 6, and p. 14 n. 10.

¹¹ Indeed the sweep of appellees' argument extends to refusals by consular officers or the Secretary of State to recommend waiver, as well as to the Attorney General's refusal to approve such a recommendation. See note 4 *supra*.

¹² Act of February 5, 1917, § 3, 39 Stat. 874, 878.

the Attorney General, to be exercised in his discretion. Still, waiver of exclusion is a matter of grace¹³ since the alien has no right to enter. And, as this Court held in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, "[t]he action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude 'a given alien.' Like suspension of an otherwise valid deportation order, waiver of exclusion is not given as a matter of right, 'but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General.'" *Jay v. Boyd*, 351 U.S. 345, 357-358; *Kimm v. Rosenberg*, 363 U.S. 405, 408. See also Section 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. 701(a)(2), which excludes from the judicial review procedures of the Act "agency action * * * committed to agency discretion by law"; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410.

Thus, whether Mandel should be permitted to enter despite his inadmissibility is a matter Congress left to the discretion of the Attorney General.

¹³ See *Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77, where Mr. Justice Harlan stated for the Court that suspension of deportation is a "matter of discretion and of administrative grace." Like suspension of deportation, waiver of exclusion is, we submit, also a matter of administrative grace.

The Attorney General, in making his determination, of course, decides whether a waiver would be in the "public interest," as Congress itself would have done in considering a private bill seeking the same relief. One thing, however, is clear: whether the "public interest" is such that a waiver should be granted is for the Attorney General, not appellees, to decide.

In any event, there is no indication in this case that the Attorney General abused the discretion Congress authorized him to exercise. Mandel was denied entry not because he sought to speak in this country, but because Congress declared aliens in his class ineligible for admission and because the Attorney General refused to waive his ineligibility in light of his violations of the conditions on his previous entry (App. 68).¹⁴ The record here thus discloses a valid basis for the Attorney General's refusal to grant a waiver and Section 212(d)(3) requires no more, as

¹⁴ Appellees err in asserting throughout their brief that the government has "disavowed reliance on the alleged violation of visa conditions by Dr. Mandel in 1968" (Brief for Appellees, at p. 17 n. 11). Appellees cite nothing to support this assertion for the obvious reason that the government has never made such a disavowal. The most that appears in the record is that the Department of State was of the view that Mandel may not have been fully aware of the conditions on his admission when he departed from his itinerary on his previous visit (App. 43) and that the Attorney General refused to grant Mandel a waiver of inadmissibility because his violations were so flagrant (App. 68).

the district court itself appeared to recognize (J. App. 25a) and as appellees previously agreed.¹⁵

2. We add one final word. According to appellees, our contention here is "that regardless of whether [our] action violates First Amendment rights of citizens, it is not subject to review by the judiciary" (Brief for Appellees, at p. 33). Of course, we have never said that courts cannot review action of the government that deprives citizens of rights under the First Amendment. Rather, our position is simply that appellees have no First Amendment rights to compel an alien's admission. Our main brief is devoted to that issue and we continue to adhere to our concluding statement that the "First Amendment's guarantee of freedom of speech does not include the power to require the admission of an alien Congress has refused to admit and it does not confer authority on appellees to determine which aliens should enter the country."¹⁶

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

¹⁵ In their complaint, appellees stated that Section 212(d) (3)—"vests unbridled discretion in the ATTORNEY GENERAL" (App. 11). See also appellees' *Memorandum In Support of Plaintiffs' Motion for the Convention of a Three Judge District Court and for a Preliminary Injunction*, at p. 27.

¹⁶ Government's Brief, at p. 39.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KLEINDIENST, ATTORNEY GENERAL, ET AL.
v. MANDEL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

No. 71-16. Argued April 18, 1972—Decided June 29, 1972

This action was brought to compel the Attorney General to grant a temporary nonimmigrant visa to a Belgian journalist and Marxian theoretician whom the American plaintiffs had invited to participate in academic conferences and discussions in this country. The alien had been found ineligible for admission under §§ 212 (a) (28) (D) and (G) (v) of the Immigration and Nationality Act of 1952, barring those who advocate or publish "the economic, international, and governmental doctrines of world communism." The Attorney General had declined to waive ineligibility as he has the power to do under § 212 (d) of the Act, basing his decision on unscheduled activities engaged in by the alien on a previous visit to the United States, where a waiver was granted. A three-judge District Court, although holding that the alien had no personal entry right, concluded that citizens of this country had a First Amendment right to have him enter and to hear him, and enjoined enforcement of § 212 as to this alien. *Held*: In the exercise of Congress' plenary power to exclude aliens or prescribe the conditions for their entry into this country, Congress in § 212 (a) (28) of the Act has delegated conditional exercise of this power to the Executive Branch. When, as in this case, the Attorney General decides for a legitimate and bona fide reason not to waive the statutory exclusion of an alien, courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien. Pp. 8-17.

325 F. Supp. 620, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-16

Richard G. Kleindienst, Attorney General of the United States, et al., Appellants, v. Ernest Mandel et al.	On Appeal from the United States Dis- trict Court for the Eastern District of New York.
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[June 29, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The appellees have framed the issue here as follows:

"Does appellants' action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?"¹

Expressed in statutory terms, the question is whether §§ 212 (a)(28)(D) and (G)(v) and § 212 (d)(3)(A) of the Immigration and Nationality Act of 1952, 66 Stat. 182-185, 8 U. S. C. §§ 1182 (a)(28)(D) and (G)(v) and § 1182 (d)(3)(A), providing that certain aliens "shall be ineligible to receive visas and shall be excluded from admission into the United States" unless the Attorney General, in his discretion, upon recommendation by the Secretary of State or a consular officer, waives inadmissibility and approves temporary admission, are unconstitutional as applied here in that they deprive American citizens of freedom of speech guaranteed by the First Amendment.

¹ Brief 1.

The challenged provisions of the statute are:

"Section 212 (a). Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

"(28) Aliens who are, or at any time have been, members of any of the following classes:

"(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship

"(G) Aliens who write or publish . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship

"(d)

"(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) . . . may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General"

Section 212 (a) (6) provides that the Attorney General "shall make a detailed report to the Congress in any case in which he exercises his authority under paragraph

(3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28)"

I

Ernest E. Mandel resides in Brussels, Belgium, and is a Belgian citizen. He is a professional journalist and is editor-in-chief of the Belgian Left Socialist weekly *La Gauche*. He is author of a two-volume work entitled "Marxist Economic Theory" published in 1969. He asserted in his visa applications that he is not a member of the Communist Party. He has described himself, however, as "a revolutionary Marxist."² He does not dispute, see 325 F. Supp., at 624, that he advocates the economic, governmental, and international doctrines of world communism.³

Mandel was admitted to the United States temporarily in 1962 and again in 1968. On the first visit he came as a working journalist. On the second he accepted invitations to speak at a number of universities and colleges. On each occasion, although apparently he was not then aware of it, his admission followed a finding of ineligibility under § 212 (a) (28), and the Attorney General's exercise of discretion to admit him temporarily, on recommendation of the Secretary of State, as § 212 (d) (3) (A) permits.

On September 8, 1969, Mandel applied to the American Consul in Brussels for a nonimmigrant visa to enter the United States in October for a six-day period during which he would participate in a conference on

² E. Mandel, *Revolutionary Strategy in the Imperialist Countries* (1969), reprinted in Appendix 54-66.

³ In their brief, appellees, while suggesting that § 101 (a) (40), defining "world communism," and § 212 (a) (28) (D) are unacceptably vague, "do not contest the fact that appellants can and do conclude that Dr. Mandel's Marxist economic philosophy falls within the scope of these vague provisions." Brief 10, n. 8.

"Technology and the Third World" at Stanford University.⁴ He had been invited to Stanford by the Graduate Student Association there. The invitation stated that John Kenneth Galbraith would present the keynote address and that Mandel would be expected to participate in an ensuing panel discussion and to give a major address the following day. The University, through the office of its president, "heartily endorse[d]" the invitation. When Mandel's intended visit became known, additional invitations for lectures and conference participations came to him from members of the faculties at Princeton, Amherst, Columbia, and Vassar, from groups in Cambridge, Massachusetts, and New York City, and from others. One conference was to be in New York City sponsored jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference; Mandel's assigned subject there was "Revolutionary Strategy in Imperialist Countries." Mandel then filed a second visa application proposing a more extensive itinerary and a stay of greater duration.

On October 23, the Consul at Brussels informed Mandel orally that his application of September 8 had been refused. This was confirmed in writing on October 30. The Consul's letter advised him of the finding of inadmissibility under § 212 (a) (28) in 1962, the waivers in that year and in 1968, and the current denial of a waiver. It said, however, that another request for waiver was being forwarded to Washington in connection with Mandel's second application for a visa. The Department of State, by a letter dated November 6

⁴ Entry presumably was claimed as a nonimmigrant alien under § 101 (a) (15) (H) (i) of the Act, 8 U. S. C. § 1101 (a) (15) (H) (i), namely, "an alien having a residence in a foreign country which he has no intention of abandoning . . . who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability"

from its Bureau of Security and Consular Affairs to Mandel's New York attorney, asserted that the earlier waivers had been granted on condition that Mandel conform to his itinerary and limit his activities to the stated purposes of his trip, but that on his 1968 visit he had engaged in activities beyond the stated purposes.⁵ For this reason, it was said, a waiver "was

⁵ Mr. JUSTICE DOUGLAS in his dissent, n. 4, *post*, p. 4, states that Mandel's noncompliance with the conditions imposed for his 1968 visit "appear merely to have been his speaking at more universities than his visa application indicated." The letter dated November 6, 1969, from the Bureau of Security and Consular Affairs of the Department of State to Mandel's New York counsel observed, "On his 1968 visit Mr. Mandel engaged in activities beyond the stated purposes of his trip. For this reason, a waiver of ineligibility was not sought in connection with his September visa application."

Counsel's affidavit in support of appellees' motion for the convening of a three-judge court and for the issuance of a preliminary injunction stated:

"Mr. Mandel further assured the Consul by letter on November 10, 1969 that he would not appear at any assembly in the United States at which money was solicited for any political cause. This was apparently in response to a charge that he had been present at such a solicitation during his 1968 tour. (See also Exhibit L.)

"Of course, just as Mr. Mandel had no prior notice that he was required to adhere to a stated itinerary in 1968, so Mr. Mandel was not aware that he was forbidden from appearing where contributions were solicited for political causes. I have been advised by Mr. George Novack, an American citizen, who coordinated Mr. Mandel's 1968 tour, that in fact the event in question was a cocktail reception held at the Gotham Art Theatre in New York City on October 19, 1968. Mr. Mandel addressed the gathering on the events in France during May and June. Later that evening posters by French students were auctioned. The money was sent to aid the legal defense of students who had taken part in the spring demonstrations. Mr. Mandel did not participate in the fund raising. (See Ex. L, Oct. 30, 1969 letter.)"

The asserted noncompliance by Mandel is therefore broader than mere acceptance of more speaking engagements than his visa application indicated.

not sought in connection with his September visa application." The Department went on to say, however, that it had now learned that Mandel might not have been aware in 1968 of the conditions and limitations attached to his visa issuance, and that, in view of this and upon his assurances that he would conform to his stated itinerary and purposes, the Department was reconsidering his case. On December 1 the Consul at Brussels informed Mandel that his visa had been refused.

The Department of State in fact had recommended to the Attorney General that Mandel's ineligibility be waived with respect to his October visa application. The Immigration and Naturalization Service, however, acting on behalf of the Attorney General, see 28 U. S. C. § 510, in a letter dated February 13, 1970, to New York counsel stated that it had determined that Mandel's 1968 activities while in the United States "went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country." The letter concluded that favorable exercise of discretion, provided for under the Act, was not warranted and that Mandel's temporary admission was not authorized.

Mandel's address to the New York meeting was then delivered by transatlantic telephone.

In March Mandel and six of the other appellees instituted the present action against the Attorney General and the Secretary of State. The two remaining appellees soon came into the lawsuit by an amendment to the complaint. All the appellees who joined Mandel in this action are United States citizens and are university professors in various fields of the social sciences. They are persons who invited Mandel to speak at universities and other forums in the United States or who expected to participate in colloquia with him so that,

as the complaint alleged, "they may hear his views and engage him in a free and open academic exchange."

Plaintiffs claim that the statutes are unconstitutional on their face and as applied in that they deprive the American plaintiffs of their First and Fifth Amendment rights. Specifically, these plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment; that § 212 (a) (28) denies them equal protection by permitting entry of "rightists" but not "leftists" and that the same section deprives them of procedural due process; that § 212 (d) (3) (A) is an unconstitutional delegation of congressional power to the Attorney General because of its broad terms, lack of standards, and lack of prescribed procedures; and that application of the statutes to Mandel was "arbitrary and capricious" because there was no basis in fact for concluding that he was ineligible, and no rational reason or basis in fact for denying him a waiver once he was determined ineligible. Declaratory and injunctive relief was sought.

A three-judge district court was duly convened. The case was tried on the pleadings and affidavits with exhibits. Two judges held that, although Mandel had no personal right to enter the United States, citizens of this country have a First Amendment right to have him enter and to hear him explain and seek to defend his views. The court then entered a declaratory judgment that § 212 (a) (28) and § 212 (d) (3) (A) were invalid and void insofar as they had been or might be invoked by the defendants to find Mandel ineligible for admission. The defendants were enjoined from implementing and enforcing those statutes so as to deny Mandel admission as a nonimmigrant visitor. Judge Bartels dissented. 325 F. Supp. 620 (EDNY 1971). Probable jurisdiction was noted. 404 U. S. 1013 (1972).

II

Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Act of August 3, 1882, 22 Stat. 214. Other legislation followed. A general revision of the immigration laws was effected by the Act of March 3, 1903, 32 Stat. 1213-1222. Section 2 of that Act made ineligible for admission "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." By the Act of October 16, 1918, 40 Stat. 1012, Congress expanded the provisions for the exclusion of subversive aliens. Title II of the Alien Registration Act of 1940, 54 Stat. 670, 671, amended the 1918 Act to bar aliens who, at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government.

In the years that followed, after extensive investigation and numerous reports by congressional committees, see *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, 94, n. 37 (1961), Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration and Nationality Act of 1952.

We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of in-

creasing control with particular attention, for almost 70 years now, first to anarchists and then to those with communist affiliation or views.

III

It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. *United States ex rel. Turner v. Williams*, 194 U. S. 279, 292 (1904); *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 542 (1950); *Galvan v. Kress*, 347 U. S. 522, 530-532 (1954); see *Horisades v. Shaughnessy*, 342 U. S. 580, 592 (1952).

The appellees concede this. Brief, at 33, Tr. of Oral Arg. 28. Indeed, the American appellees assert that "they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien." Brief, at 14. "Dr. Mandel is, in a sense made a plaintiff because he is symbolic of the problem," Tr. of Oral Arg. 22.

The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission.

IV

In a variety of contexts this Court has referred to a First Amendment right to "receive information and ideas."

"It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive . . . ' *Martin v. City*

of *Struthers*, 319 U. S. 141, 143 (1943)” *Stanley v. Georgia*, 394 U. S. 557, 564 (1969).

This was one basis for the decision in *Thomas v. Collins*, 323 U. S. 516 (1945). The Court there held that a labor organizer's right to speak and the rights of workers “to hear what he had to say,” *id.*, at 534, were both abridged by a state law requiring organizers to register before soliciting union membership. In a very different situation, MR. JUSTICE WHITE, speaking for a unanimous Court upholding the FCC's “fairness doctrine” in *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 386-390. (1969), said:

“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC.” *Id.*, at 390.

And in *Lamont v. Postmaster General*, 381 U. S. 301 (1965), the Court held that a statute permitting the Government to hold “communist political propaganda” arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an “unjustifiable burden” on the addressee's First Amendment right. This Court has recognized that this right is “nowhere more vital” than in our schools and universities. *Shelton v. Tucker*, 364 U. S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957) (opinion of Chief Justice Warren); *Keyishian v. Board of Regents*, 385 U. S. 589, 603 (1967). See *Epperson v. Arkansas*, 393 U. S. 97 (1968).

In the present case, the District Court majority held:

"The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that, as *Garrison* [v. *Louisiana*, 379 U. S. 64 (1964)], and *Red Lion* observe, is of the essence of self-government." 325 F. Supp., at 631.

The Government disputes this conclusion on two grounds. First, it argues that exclusion of Mandel involves no restriction on First Amendment rights at all since what is restricted is "only action—the action of the alien coming into this country." Brief, at 29. Principal reliance is placed on *Zemel v. Rusk*, 381 U. S. 1 (1965), where the Government's refusal to validate an American passport for travel to Cuba was upheld. The rights asserted there were those of the passport applicant himself. The Court held that his right to travel and his asserted ancillary right to inform himself about Cuba did not outweigh substantial "foreign policy considerations affecting all citizens" that, with the backdrop of the Cuban missile crisis, were characterized as the "weightiest considerations of national security." *Id.*, at 13, 16. The rights asserted here, in some contrast, are those of American academics who have invited Mandel to participate with them in colloquia, debates, and discussion in the United States. In light of the Court's previous decisions concerning the "right to receive information," we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement. In *Thomas* the registration requirement on its

face concerned only action. In *Lamont* too, the face of the regulation dealt only with the Government's undisputed power to control physical entry of mail into the country. See *United States v. Robel*, 389 U. S. 258, 263 (1967).

The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

V.

Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case*, 130 U. S. 581, 609 (1889), and in *Fong Yue Ting v. United States*, 149 U. S. 698 (1893), held broadly, as the Government describes it, Brief, at 20, that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government" Since that time, the Court's general reaffirmations of this principle have

been legion.⁶ The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boualièr v. Immigration and Naturalization Service*, 387 U. S. 118, 123 (1967). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 339 (1909). In *Lem Moon Sing v. United States*, 158 U. S. 538, 547 (1895), the first Mr. Justice Harlan said,

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Mr. Justice Frankfurter ably articulated this history in *Galvan v. Press*, 347 U. S. 522 (1954), a deportation case, and we can do no better. After suggesting, at 530, that "much could be said for the view" that due process places some limitations on congressional power in this area "were we writing on a clean slate," he continued:

"But the slate is not clean. As to the extent of the power of Congress under review, there is not merely a 'page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with

⁶ See, for example, *Ekiu v. United States*, 142 U. S. 651, 659 (1892); *Fok Yung Yo v. United States*, 185 U. S. 296, 302 (1902); *United States ex rel. Turner v. Williams*, 194 U. S. 279, 294 (1904); *Keller v. United States*, 213 U. S. 138, 143-144 (1909); *Mahler v. Eby*, 264 U. S. 32, 40 (1924); *Shaughnessy v. Mezei*, 345 U. S. 206, 210 (1953); cf. *Graham v. Richardson*, 403 U. S. 365, 377 (1971).

the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .

"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens . . ."
Id., at 531-532.

We are not inclined in the present context to reconsider this line of cases. Indeed, the appellees, in contrast to the *amicus*, do not ask that we do so. The appellees recognize the force of these many precedents. In seeking to sustain the decision below, they concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by § 212 (a) (28) (D) and (G) (v), and that First Amendment rights could not override that decision. Brief, at 16. But they contend that by providing a waiver procedure, Congress clearly intended that persons ineligible under the broad provision of the section would be temporarily admitted when appropriate "for humane reasons and for reasons of public interest." S. Rep. No. 1137, Committee on the Judiciary, 82d Cong., 2d Sess., 12 (1952). They argue that the Executive's implementation of this congressional mandate through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees. Specifically, their position is that the First Amendment rights must prevail at least where the Government advances no justification

for failing to grant a waiver. They point to the fact that waivers have been granted in the vast majority of cases.⁷

Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212 (a) (28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212 (a) (28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Gov-

The Government's brief states:

"The Immigration and Naturalization Service reports the following with respect to applications to the Attorney General for waiver of an alien's ineligibility for admission under Section 212 (a) (28):

Year	Total Number of Applications for Waiver of Section 212 (a) (28)	Number of Waivers Granted	Number of Waivers Denied
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8

Brief 18, n. 24. These cases, however, are only those that, as § 212 (d) (3) (A) provides, come to the Attorney General with a positive recommendation from the Secretary of State or the consular officer. The figures do not include those cases where these officials had refrained from making a positive recommendation.

ernment in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

Appellees seek to soften the impact of this analysis by arguing, as has been noted, that the First Amendment claim should prevail at least where no justification is advanced for denial of a waiver. Brief 26. The Government would have us reach this question, urging a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given. See *Jay v. Boyd*, 351 U. S. 345, 357-358 (1956); *Hintopoulos v. Shaughnessy*, 353 U. S. 72, 77 (1957); *Kimm v. Rosenberg*, 363 U. S. 405, 408 (1960). This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.

The Government has chosen not to rely on the letter to counsel either in the District Court or here. The fact remains, however, that the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by Mandel made it inappropriate to grant a waiver again. With this, we think the Attorney General validly exercised the plenary power that Congress delegated to the Executive by § 212 (a) (28) and (d) (3).

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a) (28), Congress has delegated conditional exercise of this power to the Executive. We hold that

when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-16

Richard G. Kleindienst, Attorney General of the United States, et al., Appellants, v. Ernest Mandel et al.	On Appeal from the United States Dis- trict Court for the Eastern District of New York.
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[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Under *The Chinese Exclusion Case*, 130 U. S. 581, rendered in 1889, there could be no doubt but that Congress would have the power to exclude any class of aliens from these shores. The accent at the time was on race. Mr. Justice Field writing for the Court said: "If therefore the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects." *Id.*, at 606.

An ideological test, not a racial one, is used here. But neither, in my view, is permissible, as I have indicated on other occasions.¹ Yet a narrower question is raised here. Under the present Act aliens who advocate or teach "the economic, international, and governmental doctrines of world communism" are ineligible to receive visas "except as otherwise provided in this chapter."² The "except" provision is contained in another part of

¹ See *Harisiades v. Shaughnessy*, 342 U. S. 580, 598; *Galvan v. Press*, 347 U. S. 522, 533.

² Section 212 (a) (28) (G) (2) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1182 (a) (28) (G) (v).

the same section³ and states that an inadmissible alien "may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular office" admit the alien "temporarily despite his inadmissibility."

Dr. Ernest Mandel, who is described as "an orthodox marxist of the Trotskyist school" has been admitted to this country twice before—once as a working journalist in 1962 and once as a lecturer in 1968. The present case involves his third application, made in 1969, to attend a conference at Stanford University on Technology and the Third World. He was also invited to attend other conferences, one at MIT, and to address several universities, Princeton, Amherst, the New School, Columbia, and Vassar. This time the Department of Justice refused to grant a waiver recommended by the State Department; and it claims that it need not state its reasons, that the power of the Attorney General is unfettered.

Dr. Mandel is not the sole complainant. Joining him are the other appellees who represent the various audiences which Dr. Mandel would be meeting were a visa to issue. While Dr. Mandel, an alien who seeks admission, has no First Amendment rights while outside the Nation, the other appellees are on a different footing. The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. *Martin v. Struthers*, 319 U. S. 141, 143; *Stanley v. Georgia*, 394 U. S. 557, 564.

Can the Attorney General under the broad discretion entrusted in him decide

that one who maintains that the earth is round can be excluded?

that no one who believes in the Darwinian theory shall be admitted?

that those who promote a Rule of Law to settle inter-

³ Section 212 (d) (3) (A).

national differences rather than a Rule of Force may be barred?

that a genetic biologist who lectures on the way to create life by one sex alone is beyond the pale?

that an exponent of plate tectonics can be barred?

that one should be excluded who taught that Jesus when he arose from the sepulchre, went east (not up) and became a teacher at Hemis Monastery in the Himalayas?

I put the issue that bluntly because national security is not involved. Nor is the infiltration of saboteurs. The Attorney General stands astride our international terminals that bring people here to bar those whose ideas are not acceptable to him. Even assuming, *arguendo*, that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveller's lectures do.

Thought control is not within the competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education. We should construe the Act generously by that First Amendment standard, saying that once the State Department has concluded that our foreign relations permit or require the admission of a foreign traveler, the Attorney General is left only problems of national security, importation of heroin, or other like matters within his competence.

We should assume that where propagation of ideas is permissible as being within our constitutional framework, the Congress did not undertake to make the Attorney General a censor. For as stated by Justice Jackson in *Thomas v. Collins*, 323 U. S. 516, 545 (concurring), "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must

be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

In *Brandenburg v. Ohio*, 395 U. S. 444 (which overruled *Whitney v. California*, 274 U. S. 357), we held that the First Amendment does not permit a State "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. That case involved propagation of the views of the Ku Klux Klan. The present case involves teaching the communist creed.⁴ But as we held in *Noto v. United States*, 367 U. S. 290, 297-298:

"... the mere abstract teaching of Communist theory, including the teaching of the moral pro-

⁴ The Court recognizes the legitimacy of appellee's First Amendment claim, *ante*, at 8-11. It argues, however, that inasmuch as the Attorney-General gave a "facially legitimate and bona fide" reason to refuse Dr. Mandel a waiver of ineligibility, the Court should not "look behind the exercise of that discretion, nor test it by balancing its justification against [appellee's] First Amendment interests"

First, so far as the record reveals, there is absolutely no support for the Attorney General's claim that Dr. Mandel consciously abused his visa privileges in 1968. Indeed, the State Department itself concedes that he "was apparently not informed [in 1962 and 1968] that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance." App. 22. Second, the activities which the Attorney General labelled "flagrant abuses" of Dr. Mandel's opportunity to speak in the United States appear merely to have been his speaking at more universities than his visa application indicated. Indeed, he spoke at more than 30 universities in the United States and Canada, including Harvard, Berkeley, Swarthmore, Notre Dame, Antioch, Michigan, three appearances at Columbia, two at the University of Pennsylvania, and the keynote address at the 1968 Socialist Scholar's Conference held at Rutgers. App. 25. It would be difficult to invent a more trivial reason for denying the academic

priety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

As a matter of statutory construction, I conclude that Congress never undertook to entrust the Attorney General with the discretion to pick and choose among the ideological offerings which alien lecturers tender from our platforms, allowing those palatable to him and disallowing others.⁵ The discretion entrusted to him concerns matters commonly within the competence of the Department of Justice—national security, importation of drugs, and the like.

I would affirm the judgment of the three-judge District Court.

community the chance to exchange views with an internationally respected scholar.

⁵ As indicated in S. Rep. No. 1137, 82d Cong., 2d Sess., 112, the discretion vested in the Attorney General was to be exercised "for emergent reasons or for reasons deemed strictly in the public interest." Ideological controls are not congenial to our First Amendment traditions and therefore should not be inferred.

SUPREME COURT OF THE UNITED STATES

No. 71-16

Richard G. Kleindienst, Attorney
General of the United States,
et al.; Appellants,

v.

Ernest Mandel et al.

On Appeal from the
United States District
Court for the
Eastern District of
New York.

[June 29, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Dr. Ernest Mandel, a citizen of Belgium, is an internationally famous Marxist scholar and journalist. He was invited to our country by a group of American scholars who wished to meet him for discussion and debate. With firm plans for conferences, colloquia and lectures, the American hosts were stunned to learn that Mandel had been refused permission to enter our country. American consular officials had found Mandel "ineligible" to receive a visa under § 212 (a) (28) (D) and (G) (v) of the Immigration and Naturalization Act of 1952, which bars even temporary visits to the United States by aliens who "advocate the economic, international and governmental doctrines of world communism" or "who write or publish . . . any written or printed matter . . . advocating or teaching" such doctrines. Under § 212 (d) (3), the Attorney General refused to waive inadmissibility.

I, too, am stunned to learn that a country with our proud heritage has refused Dr. Mandel temporary admission. I am convinced that Americans cannot be denied the opportunity to hear Dr. Mandel's views in person because their Government disapproves of his ideas. Therefore, I dissent from today's decision and would affirm the judgment of the court below.

I

As the majority correctly demonstrates, in a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process, in Justice Brandeis' words, "reason as applied through public discussion," *Whitney v. California*, 274 U. S. 357, 375 (1927) (concurring opinion); and the right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." *Ibid.*; see *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949). Its protection is "a fundamental principle of the American government." *Whitney v. California*, *supra*, at 375. The First Amendment means that Government has no power to thwart the process of free discussion, to "abridge" the freedoms necessary to make that process work. See *Lamont v. Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring, with whom GOLDBERG, J., and HARLAN, J., joined).

There can be no doubt that by denying the American appellees access to Dr. Mandel, government has directly prevented the free interchange of ideas guaranteed by the First Amendment.¹ It has, of course, interfered

¹ Twenty years ago, the Bulletin of the Atomic Scientists devoted an entire issue to the problem of American visa policy and its effect on the interchange of ideas between American scholars and scientists and their foreign counterparts. The general conclusion of the

with appellees' personal rights both to hear Mandel's views and to develop and articulate their own views through interaction with Mandel. But as the court below recognized, apart from appellees' interests, there is also a "general public interest in the prevention of any stifling of political utterance." 325 F. Supp. 620, 632 (1971). And government has interfered with this as well.²

II

What is the justification for this extraordinary governmental interference with the liberty of American citizens? And by what reasoning does the Court uphold Mandel's exclusion? It is established constitutional doctrine, after all, that government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest. *E. g.*,

editors—supported by printed statements of such men as Albert Einstein, Hans Bethe, Harold Urey, Arthur Compton, Michael Polyani, and Raymond Aron—was that American visa policy was hurting the continuing advance of American science and learning, and harmful to our prestige abroad. Volume VIII, No. 7, October 1952, pp. 210-217 (statement of Special Editor Edward Shils). The detrimental effect of American visa policy on the free exchange of ideas continues to be reported. See Comment, Opening the Floodgates to Dissident Aliens, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 141, 143-149 (1970); Bulletin of the Atomic Scientists, Vpl. XI, December 1955, pp. 367-373.

² The availability to appellees of Mandel's books and taped lectures is no substitute for live, face-to-face discussion and debate, just as the availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work. Lengthy citations for this proposition, which the majority apparently concedes, are unnecessary. I simply note that in a letter to Henrik Lorenz, accepting an invitation to lecture at the University of Leiden and to discuss "the radiation problem," Albert Einstein observed that "In these unfinished things, people understand one another with difficulty unless talking face to face." Quoted in Note, Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1154 (1972).

Lamont v. Postmaster General, *supra*, at 308; *NAACP v. Button*, 371 U. S. 415, 438 (1963); *Gibson v. Florida Legislative Committee*, 372 U. S. 539, 546 (1963); *Shelton v. Tucker*, 364 U. S. 479 (1960).

A. Today's majority apparently holds that Mandel may be excluded and Americans' First Amendment rights restricted because the Attorney General has given a "facially legitimate and bona fide reason" for refusing to waive Mandel's visa ineligibility. I do not understand the source of this unusual standard. Merely "legitimate" governmental interests cannot override constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule.³

Even the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham. The Attorney General informed appellees' counsel that the waiver was refused because Mandel's activities on a previous American visit "went far beyond the stated purposes of his trip . . . and represented a flagrant abuse of the opportunities afforded him to express his views in this country" App. 68. But, as the Department of State had already conceded to appellees' counsel, Dr. Mandel "was apparently not informed that [his previous] visa was issued only after obtaining a waiver of ineligibility and therefore [Mandel]

³ As Judge Frankel has taught us, even the limited requirement of facially sufficient reasons for governmental action may be significant in some contexts; but it can hardly insulate the government from subsequent challenges to the actual good faith and sufficiency of the reasons. Frankel, *Bench Warrants Upon the Prosecutor's Demand*, 71 Col. L. Rev. 403, 414 (1971).

may not have been aware of the conditions and limitations attached to the [previous] visa issuance." App. 22. There is *no* basis in the present record for concluding that Mandel's behavior on his previous visit was a "flagrant abuse"—or even willful or knowing departure—from visa restrictions. For good reason, the Government in this litigation has *never* relied on the Attorney General's reason to justify Mandel's exclusion. In these circumstances, the Attorney General's reason cannot possibly support a decision for the Government in this case. But without even remanding for a factual hearing to see if there is *any* support for the Attorney General's determination, the majority declares that his reason is sufficient to override appellees' First Amendment interests.

B. Even if the Attorney General had given a compelling reason for declining to grant a waiver under § 212(d)(3)(A), this would not, for me, end the case. As I understand the statutory scheme, Mandel is "ineligible" for a visa, and therefore inadmissible, solely because, within the terms of § 212(a)(28), he has advocated communist doctrine and has published writings advocating that doctrine. The waiver question under § 212(d)(3)(A) is totally secondary and dependent, since it is triggered here only by a determination of (a)(28) ineligibility. The Attorney General's refusal to grant a waiver does not itself generate a new statutory basis for exclusion; he has no roving power to set new *ad hoc* standards for visa ineligibility. Rather, the Attorney General's refusal to waive ineligibility simply has the same effect as if no waiver provision existed; inadmissibility still rests on the (a)(28) determination. Thus, whether or not the Attorney General had a good reason for refusing a waiver, this Court, I think, must still face the question it tries to avoid: under our Constitution, may Mandel be declared ineligible under (a)(28)?

C. Accordingly, I turn to consider the constitutionality of the sole justification given by the Government here or below for excluding Mandel—that he “advocates” and “publishes . . . printed matter . . . advocating . . . doctrines of world communism” within the terms of § 212 (a) (28).

Still adhering to standard First Amendment doctrine, I do not see how (a) (28) can possibly represent a compelling governmental interest which override appellees’ interests in hearing Mandel.⁴ Unlike (a) (27) or (a) (29), (a) (28) does not claim to exclude aliens who are likely to engage in subversive activity or who represent an active and present threat to the “welfare, safety, or security of the United States.” Rather, (a) (28) excludes aliens solely because they have advocated communist doctrine. Our cases make clear, however, that Government has no legitimate interest in stopping the flow of ideas. It has no power to restrict the mere advocacy of communist doctrine, divorced from incitement to imminent lawless action. *Noto v. United States*, 367 U. S. 290, 297–298 (1961); *Brandenburg v. Ohio*, 395 U. S. 444, 447–449 (1969). For those who are not sure that they have attained the final and absolute truth, all ideas, even those forcefully urged, are a contribution to the ongoing politi-

⁴ The majority suggests that appellees “concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by § 212 (a) (28) (D) and G (v) and that First Amendment rights could not override that decision.” This was certainly not the view of the court below, whose judgment the Government alone has challenged here and appellees have moved to affirm. It is true that appellees have argued to this Court a ground of decision alternative to that argued and adopted below; but they have hardly conceded the incorrectness of what they successfully argued below. They have simply noted at p. 16 of their Brief that even if this Court rejects the broad decision below, there would nevertheless be a separate and narrower basis for affirmance. See Tr. of Oral Arg. 24, 25–26, 41–42.

cal dialogue. The First Amendment represents the view of the Framers that "[t]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones," "more speech." *Whitney v. California*, 274 U. S. 357, 375, 377 (1927) (Brandeis, J., concurring). If Americans want to hear about Marxist doctrine, even from advocates, government cannot intervene simply because it does not approve of the ideas. It certainly may not selectively pick and choose which ideas it will let into the country. But, as the court below put it, § 212 (a)(28) is nothing more than "a means of restraining the entry of disfavored political doctrine," 325 F. Supp. 620, 626 (1971), and such an enactment cannot justify the abridgment of appellees' First Amendment rights.

In saying these things, I am merely repeating established First Amendment law. Indeed, this Court has already applied that law in a case concerning the entry of communist doctrine from foreign lands. In *Lamont v. Postmaster General*, 381 U. S. 301 (1965), this Court held that the right of an American addressee to receive communist political propaganda from abroad could not be fettered by requiring the addressee to request in writing its delivery from the Post Office. See, *id.*, at 308 (BRENNAN, J., concurring). The burden imposed on the right to receive information in our case is far greater than in *Lamont*, with far less justification. In *Lamont*, the challenged law merely regulated the flow of mail, and required the Postmaster General to forward detained mail immediately upon request by the addressee. By contrast, through § 212 (a)(28), the Government claims absolute power to bar Mandel permanently from academic meetings in this country.

Moreover, in *Lamont*, the Government argued that its interest was not to censor content but rather to protect Americans from receiving unwanted mail. Here, Mandel's exclusion is not incident to a legitimate regulatory objective, but is based directly on the subject matter of his beliefs.

D. The heart of the Government's position in this case, and the basis for its distinguishing *Lamont*, is that its power is distinctively broad and unreviewable because "the regulation in question is directed at the admission of aliens." Brief, p. 33. Thus, in the Government's view, this case is no different from a long line of cases holding that the power to exclude aliens is left exclusively to the "political" branches of Government, Congress, and the Executive.

These cases are not the strongest precedents in the U. S. Reports, and the majority's baroque approach reveals its reluctance to rely on them completely. They include such milestones as *The Chinese Exclusion Case*, 130 U. S. 581 (1889), and *Fong Yue Ting v. United States*, 149 U. S. 698 (1893), in which this Court upheld the Government's power to exclude and expel Chinese aliens from our midst.

But none of these old cases must be "reconsidered" or overruled to strike down Dr. Mandel's exclusion, for none of them was concerned with the rights of American citizens. All of them involved only rights of the excluded aliens themselves. At least when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute. "When Congress' exercise of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." *Robel v. United States*, 389 U. S. 258, 264 (1967). As

Robel and many other cases⁵ show, all governmental power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative or Executive, but rather we consider those claims in light of the individual freedoms. This should be our approach in the present case, even though the Government urges that the question of admitting aliens may involve foreign relations and national defense policies.

The majority recognizes that the right of American citizens to hear Mandel is “implicated” in our case. There were no rights of Americans involved in any of the old alien exclusion cases, and therefore their broad counsel about deference to the political branches is inapplicable. Surely a Court which can distinguish be-

⁵ In *Robel*, this Court struck down a statute making it a criminal offense for any employee of a “defense facility” to remain a member of the Communist Party, in spite of Government claims that the enactment came within the “war power.” In *Aptheker v. Secretary of State*, 378 U. S. 500 (1964), the Government unsuccessfully sought to defend the denial of passports to American members of the Communist Party, in spite of claimed threats to the national security. In *Zemel v. Rusk*, 381 U. S. 1 (1965), the passport restriction on travel to Cuba was upheld because individual constitutional rights were overridden by the “weightiest considerations of national security”; but the Court rejected any assumption “that simply because a statute deals with foreign relations, it can grant the executive totally unrestricted freedom of choice.” *Id.*, at 16, 17. In *Schneider v. Rusk*, 377 U. S. 163 (1964), the Government unsuccessfully attempted to justify a statutory inequality between naturalized and native-born citizens under the foreign relations power. And in *Lamont* itself, as JUSTICE BRENNAN noted, the Government urged that the statute was “justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda”; JUSTICE BRENNAN answered that Government must act “by means and on terms which do not endanger First Amendment rights.” *Id.*, at 319.

tween pre-indictment and post-indictment lineups, *Kirby v. Illinois*, — U. S. — (1972), can distinguish between our case and cases which involve only the rights of aliens.

I do not mean to suggest that simply because some Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest.⁶ Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interests which would surely be compelling.⁷ But in Dr. Mandel's case, the Government has, and claims, no such compelling interest. Mandel's visit was to be temporary.⁸ His "ineligibility" for a visa was based solely on § 212 (a)(28). The only governmental interest embodied in that section is the Government's desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest. Section (a)(28) may not be the basis for excluding an alien when Americans wish to hear him. Without any claim that Mandel "live" is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted. *Lamont v. Postmaster General*, *supra*.

⁶ I agree with the majority that courts should not inquire into such things as the "probity of the speaker's ideas." Neither should the Executive, however. Where Americans wish to hear an alien, and their claim is not a demonstrated sham, the crucial question is whether the Government's interest in excluding the alien is compelling.

⁷ It goes without saying, of course, that, once he has been admitted, any alien (like any citizen) can be punished if he incites lawless acts or commits other crimes.

⁸ Such "nonimmigrants" are not covered by quotas. Gordon & Rosenfield, *Immigration Law and Procedure* § 2.6 (1971).

III

Dr. Mandel has written about his exclusion, concluding that "[i]t demonstrates a lack of confidence" on the part of our Government "in the capacity of its supporters to combat Marxism on the battleground of ideas." He observes that he "would not be carrying any high explosives, if I had come, but only, as I did before, my revolutionary views which are well known to the public." And he wryly notes that "In the nineteenth century the British ruling class, which was sure of itself, permitted Karl Marx to live as an exile in England for about forty years." App. 54.

It is undisputed that Dr. Mandel's brief trip would involve nothing but a series of scholarly conferences and lectures. The progress of knowledge is an international venture. As Mandel's invitation demonstrates, individuals of differing world views have learned the ways of cooperation where governments have thus far failed. Nothing is served—least of all our standing in the international community—by Mandel's exclusion. In blocking his admission, the Government has departed from the basic traditions of our country, its fearless acceptance of free discussion. By now deferring to the Executive, this Court departs from its own best role as the guardian of individual liberty in the face of governmental overreaching. Principles of judicial restraint designed to allow the political branches to protect national security have no place in this case. Dr. Mandel should be permitted to make his brief visit.

I dissent.